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THE UNIVERSITY OF ALBERTA

THE USE OF ANTHROPOLOGISTS AS EXPERT WITNESSES IN COURT

by

DONNA LEA HAWLEY

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

OF MASTER OF ARTS

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EDMONTON, ALBERTA

Spring, 1986

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled THE USE OF ANTHROPOLOGISTS AS EXPERT WITNESSES IN COURT submitted by Donna Lea Hawley in partial fulfilment of the requirements for the degree of Master of Arts.

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Date April 23, 1986

ABSTRACT

This thesis is an examination of the use of social and cultural anthropologists as expert witnesses in Canadian courts. It focuses on the relationship between the disciplines of anthropology and law and how knowledge can be exchanged and utilized.

To do this the law concerning expert witnesses is explained for anthropologists to give them insight into legal rules. The development of the incorporation of social science evidence into the trial process is also outlined.

Two recent cases which used anthropologists are discussed and compared to illustrate the use of anthropological expert evidence. These cases show that even though the evidence may give the court a greater understanding of Indian culture, it may not always provide a legal defence.

Finally the thesis discusses concerns related to the interactions between lawyers and anthropologists such as bias, motivation for appearing, competence and the role each plays in the outcome of a case. Anthropologists are encouraged to learn more about their possible role in the legal system and lawyers are encouraaged to appreciate the contribution potential of anthropological evidence.

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I. INTRODUCTION

The use of anthropologists as expert witnesses in Canadian courts is a relatively new phenomenum. Reported cases are infrequently found, and within those the discussion of the role of anthropological witnesses is often by way of a kind mention in the recitation of the facts of the case. As yet, Canada has not had a decisive line of cases decided on social science evidence that changed the flow of judicial precident, such as the school segregation cases in the United States.[1] The time, however, is ripe for change, within the legal system.

There are currently in Canada two government sponsored trends that, as they develop, should create a necessity for an increased application of anthropological expertise not only within the judicial system, but in every aspect of life. The nationally created and sponsored multiculturalism concept as a Canadian way of life demands that all understand and appreciate the varied cultural backgrounds of our fellow citizens. We are now confirming that separate cultural, social and linguistic communities exist side by side, as a positive realization. All people, regardless of their order of arrival here, are being encouraged to maintain their cultural traditions with pride. The second trend is the government acceptance of and recognition of

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[1]In a recent survey of Canadian anthropologists, which included physical as well as cultural anthropologists, of the 323 questioned, replies indicated that only 12 anthropologists had acted at some time as an expert witness in 14 cases. Rene Gadaz, personal communication, July, 1984.

native culture which has recently joined with the native Indian, Inuit and Metis demand for cultural and linguistic recognition.

These two government sponsored, as well as community supported, tendencies affect most areas of life for all concerned. While education, language, religion, festivals and holidays, life styles, family structure, and choice of material acquisition are all important aspects of life, this study is only concerned with the way cultural differences are presented to the Canadian legal system. Within the numerous groups defined within the multicultural concept of the nation, several social science issues are readily apparent. These include: the lack of understanding of our legal concepts and language by litigants or witnesses in court proceedings; conflicts that arise with interpretation of international contracts; and the resolution of divorce or custody disputes of parties who married in a foreign country with legal concepts different from those existing here. In addition to these types of issues changes are rapidly occuring within our own society that demand a social science explanation, such as changing religious beliefs conflicting with Sunday observance laws, demands for gay rights, and varying opinions on obscenity, pornography and gambling.

Native legal issues are more visible. The question as to who are Indians is clearly legal, but must be based on historic and social criteria. Land claims again is a mixed issue. All of these concerns are in regards to a community

of native persons. Individuals, as members of a native community, have cultural concerns when they are charged with committing an act which is unlawful pursuant to the Canadian law, but is permissible under the cultural norms of the community. It is this area which proves to be one of the most difficult to resolve in terms of a cultural explanation and which will be considered in this thesis.

The legal system has many aspects. There are the law making bodies including Parliament, provincial legislatures and municipal authorities which create statutory law; the court systems which interpret and apply the law; and the police and Attorney General offices who enforce it. In addition there are many collateral institutions which add to and support the legal system by providing information or suggestions for reform and by adjudicating matters within their statutory competence. Such bodies include Royal Commissions, Law Research and Reform commissions, and various boards of inquiry set up on a permanent basis such as for labour arbitratrion or those set up for a special concern such as the Mackenzie Valley Pipeline Inquiry.

Anthropologists, and other experts from nearly every field of study, have appeared as witnesses, and given reports to all of these branches of the legal system from time to time. This thesis is concerned with expert "witnesses" in the exact legal sense of that term. That is, it will examine only those instances where witnesses give their testimony pursuant to the rules of evidence. Because

of this, only those cases that have been heard by a court of competent jurisdiction in Canada will be examined. I will not consider testimony given at Boards of Inquiry, to Royal Commissions or to any other institution which does not strictly apply the rules of evidence. This restriction has been chosen so that all the instances examined will have been conducted under the same rules, and so a clearer picture of the use of experts can be arrived at for the particular set of circumstances of trial court testimony. Trials hear evidence on a once for all time basis. The evidence is given for a particular fact situation and cause of action, and applies specifically only to that case. There is generally no procedure which allows further comment on the evidence after the trial. The trier of fact at the trial determines the facts and what evidence constitutes the facts. Appeals from a trial may be made only on issues of law, not issues of fact, so once the trial court determines what evidence it accepts as fact, this decision cannot be overturned. No further expert or other evidence may be added to clarify or overrule the evidence at a trial.

Information finding bodies such as Royal Commissions or Boards of Inquiry, on the other hand, are more in the nature of ongoing concerns and may call further expert witnesses to clarify concerns, add new information, or dispute evidence previously given. They may also reopen their hearings, or write reports subsequent to their "final" report. This allows these bodies the flexability to seek academic

examination and debate on the evidence before them. Courts cannot. They receive expert, as all, evidence as "the truth and nothing but the truth" and beyond cross-examination and the opposing side's case, the evidence is not subject to debate, enlargement or further explanation. It is this strict inquiry of anthropological knowledge on which this thesis will focus.

In the examination of the relationship between the court situation and the social science expert witness, this study will focus on the relationship itself and not the subject matter of the individual cases. This work will concentrate on the legal mechanism which permits anthropologists to give expert evidence and how anthropologists can and do respond to this.

Although the topic of this thesis is the role of anthropologists as expert witnesses,, much information and discussion will be on social scientists rather than just anthropologists. Social scientists, for this purpose, include social and cultural anthropologists, sociologists and non-clinician psychologists. Psychiatrists have been excluded because they are more properly classified within the discipline of medicine, and because the focus of their work is the individual not the group. Throughout this thesis the terms social science or scientist should be read as being analogus to the term cultural or social anthropology or anthropologist, where the term anthropology or anthropologist is used it is intended to apply specifically

to that discipline.

This thesis will discuss the topic in four main chapters. The first, Chapter 2, will give a detailed explanation of the law of evidence in Canada as it relates to expert witnesses. It will start with a comment on opinion evidence in general, then will examine the rules that have been developed both by legislation, and by practice as expressed in the common law. It will address what restrictions are placed on the types of statements that can be made by an expert as well as how the courts and counsel use the experts to get the information they require.

Chapter 3 will briefly outline a history of the use of anthropologists and other social scientists as expert witnesses. It will give an overview of the American usage through the school segregation cases to the land claims cases of today. It will then present a description of the Canadian cases that have employed this type of evidence to show the development of the practice in Canada, and to outline what this evidence has done and can do for the legal system and application of law.

Chapter 4 will present a detailed examination of two recent Canadian cases that used anthropologists as expert witnesses. It is included to demonstrate how an anthropologist may be used in an actual case, the types of information that can be offered by the expert, and to show how cases are actually conducted.

Chapter 5 will discuss, from the perspective of the discipline of Anthropology, what this usage has done and may do to anthropologists and anthropological research. Concern has been expressed in the United States that harm may come to the discipline if opposing camps of advocates are formed. This chapter will examine the literature on this concern and include discussion on these issues.

II. THE LAW OF EXPERT WITNESSES

A. Introduction

This chapter will outline the law of expert evidence or opinion evidence as it is often called. As will be redily seen, this area of the law of evidence has been developed primarily from criminal law cases and in relation to scientific witnesses. The one area within social science which has been comprehensively developed is in reference to psychiatric and psychological evidence. Even this, however, has been treated as "scientific" evidence, since it generally results from the evidence of medical practitioners, who are specialists within psychiatry. The rules of law that have been developed in regards to the admission of opinion evidence by experts are generally geared towards the criminal burden of proof, and opinion by hypothetical question based on assumed hard facts. The application of some of these evidential rules may, in some instances, require modification or development for the social science expert.

B. Opinion Evidence in General

Opinion Evidence

In order for a court to apply the law to resolve a legal issue or conflict, it must first determine what happened in the events that gave rise to the litigation. In

other words, it must make a finding of fact. This is accomplished by the consideration of admissible and relevant evidence given by the various witnesses who are parties to the litigation or who have some personal knowledge of the events in dispute.[2] The witnesses are required by the rules of evidence to state only that information which is within their personal knowledge. That is, a witness may state information perceived by his [3] senses of sight, hearing,[4] smell, touch or taste. A witness may not make assumptions or opinions about facts that he perceived:

> . . . a witness today would be permitted to state that the man he observed at the scene of the shooting was approximately six feet in height. This would be an opinion based on actual knowledge (a perceived fact) and an opinion given based on his observation of hundreds of people of varying height, and in this instance perhaps estimated in relation to other people present or to the height of a door. This same witness (assuming he saw no more than the man holding a gun) would not be permitted to give testimony that in his opinion this man fired the shot (Maloney and Tomlinson 1972: 220).

It is often difficult to accurately distinguish between what

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[2]For a description of the general law of evidence see Sopinka and Lederman (1974), or McWilliams (1974).
[3]The term he will be used throughout this thesis for simplicity with the intention, as that in the Interpretation Act, that he also means she.
[4]Note that the hearsay rule prohibits the admission of a statement told by a third person to the witness, since the witness cannot swear to the truth of that statement.

are observations and statements that are opinions based on observations as such differentation is often only one of degree. This difficulty of expressing only perceived facts has been recognized and the courts are willing to accept lay opinion in some instances. Mr. Justice Robertson, in R. v. German, expressed the law as follows (1947: 98-99):

> No doubt, the general rule is that it is only persons who are qualified by some special skill, training or experience who can be asked their opinion upon a matter in issue. The rule is not, however, an absolute one. There are a number of matters in respect of which a person of ordinary intelligence may be permitted to give evidence of his opinion upon a matter of which he has personal knowledge. Such matters as the indentity of individuals, the apparent age of a person, the speed of a vehicle are among the matters upon which witnesses have been allowed to express an opinion, notwithstanding that they have no special qualifications, other than the fact that they have personal knowledge of the subject-matter, to enable them to form an opinion. Doubtless there are many other matters of common experience in respect of which persons with no special qualifications are permitted to state what is really a matter of opinion . . . In many of these cases the question is framed as a question of fact, and not a question of

opinion. I am sure there have been many cases where a witness has been asked whether a person was sober or not, and has been allowed to state what is after all, a matter of opinion, but the answer is given as if nothing but a mere question of fact was involved. There is therefore, a limited acceptance of opinion evidence by lay witnesses when it is based on personal knowledge of the facts in issue.

Reasons for Exclusion

The opinions of witnesses are excluded from evidence for a number of reasons, five of which are set out by Sopinka and Lederman as follows (1974: 297-298):

(1) Witnesses should be limited to testifying about facts actually perceived by them, and that any inferences which flow therefrom should be left to the province of the tribunal of fact;

(2) If the matter in issue is non-technical, the tribunal of fact can just as readily as the witness draw the appropriate inferences from the facts and thus the witness' opinion is irrelevant;

(3) If a witness is permitted to give his opinion on a matter which the jury is capable of determining for itself without assistance, there is the danger that numerous witnesses will be called to give their opinion resulting in a waste of the court's time and the confusion of issues;

(4) There is the concern that a jury may too readily accept the opinion of influential witnesses without exercising their own independent judgment;

(5) The admissibility of opinion would permit a witness to testify without any fear of prosecution for perjury.

A sixth reason was given by McDonald (1978) that injustice could result from the acceptance of an incorrect inference or opinion by a lay witness. The Supreme Court of Canada summed up the reasons for exclusion and inclusion, of opinion evidence as follows (R. v. Fisher 1961: 19):

> It is trite to say that a witness may not give his opinion upon matters calling for special skill or knowledge unless he is an expert in such matters nor will an expert witness be allowed to give his opinion upon matters not within his particular field. Finally, opinion evidence may not be given upon a subject-matter within what may be described as the common stock of knowledge. Subject to these rules, the basic reasoning which runs through the authorities here and in England, seems to be that expert opinion evidence will be admitted where it will be helpful to the jury in their deliberations and it will be excluded only where the jury can as easilly draw the necessary inferences without it. When the latter is the situation, the intended opinion evidence is superfluous and its admission

would only involve an unnecessary addition to the testimony placed before the jury.

Opinion evidence by lay witnesses, thus, is restricted to areas within their personal experience and knowledge. Special rules permit the admission of opinions by experts and this will be the focus of the remainder of this chapter.

C. Expert Evidence

"The object of expert evidence is to explain the effect of facts of which otherwise no coherent rendering can be given" (Village of Kelliher v. Smith 1931: 684). The duty of an expert witness has been held to be to provide the court with scientific criteria necessary for testing the accuracy of the expert's conclusions; so the court can form its own independent judgment by applying the criteria to the facts (McCalla 1981-82). The exception to the rule excluding opinion evidence is justified on the grounds "that the expert is, by reason of his particular skill and training, able to draw inferences which the tribunal could not draw" (Stenning 1969: 187). In deciding whether evidence is to be included as expert evidence, a test was set out in R. v. De Tonnancourt (1955: 28) as:

> In determining whether testimony falls within the section, the court must look not only to the witness himself, to consider whether he is a professional or other expert, but even more to the character of his evidence, to decide whether it is in the category of

opinion evidence.

Development of the Exception

Courts were established as early as 1072 when justices were sent out from the King's Council. Henry I (1100-1135) had courts mainly to try criminal matters; while under Henry II (1154-1189) England was organized into circuits with a regular attendance by judges. Early forms of evidence included ordeal, compurgation, witnesses and battle. These all became obsolete in favour of trial by jury. Juries may have been introduced by William I (1066-1087), but Henry II (1154-1189) is credited with the development of the English jury system (Kiralfy 1958).

In early times, jurymen were appointed because of special knowledge they held about the case being tried and thus used by the court to make a finding of fact (Gormley 1955; Kiralfy 1958). The usefulness of specialists from scientific fields was recognized as early as 1554 when a court stated (Buckley v. Thomas 1554: 192):

> I grant that if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns, which is an honourable and commendable thing in our law.

In 1782 a court permitted the opinion evidence of a scientific expert who had no personal knowledge of the facts of the case (Folkes v. Chadd 1782).

Since these early developments, common law, statutes and rules of court have all defined and refined the law relating to expert or opinion evidence.

Types of Cases

The field of medicine provides most of the experts called in court proceedings. Various medical doctors such as orthopedic surgeons, neurologists and other specialists are required in civil cases involving the assessment of damages for personal injury claims; pathologists are required in civil or criminal cases concerning death; and psychiatrists are employed in criminal cases involving issues of insanity, capacity or abnormal behavior. McWilliams (1974) identifies legal issues that have been assisted by the evidence of experts to include: the identification of authorship or literary style, handwriting, cause of death, sanity and possession of intent, artistic and literary qualities of a publication on issue of obscenity, ballistics, breathalyzer, community standards as to obscenity, fingerprints, palm prints, foreign law, infrared photography and spectography, intoxication, and public opinion polls.

Other sciences include the use of explosives (Brownlee v. Hand Fireworks 1931), family planning (R. v. Morgantaler 1973), gross indecency (R. v. Lupien 1969), land values (City of St. John v. Irving 1966), automatism (Bleta v. R. 1964), sexual psychopathy (R. v. Neil 1957), patent cases (Scragg v. Leesona 1946), expropriation cases (Lacroix v.

NCC 1979) navigation and seamanship cases (MacMillan v. Pan Ocean 1981) and zoning cases (Spruceside v. City 1975). Other cases involving social science evidence include hunting as a part of Indian culture (R. v. Dick 1982), Indian religion (R. v. Jack 1982), traditional occupation of Indian lands (Baker Lake v. Minister 1980), and aboriginal land claims (Calder v. AGBC 1973).

There appears to be a growing use of experts from the "soft" sciences, in litigation concerning personal liberties and lifestyles which are maintained to be adversely interfered with by the application of the law. The rules governing the use of expert opinion evidence have developed in reference to experts in the "hard" sciences, but as will be seen, this has not as yet had any adverse affect on the introduction of social science expertise.

Court Appointed Experts

The court may appoint an expert to assist it with technical or scientific evidence. Such appointments must be made under the appropriate legislation or rules. Courts in Alberta (Alberta Rules), Ontario (Ontario Rules), Manitoba (Manitoba Rules), and Nova Scotia (Nova Scotia Rules) may appoint experts to assist them. The Ontario Rules provide that:

> 267 (1) The court may obtain the assistance of Such an expert may assist the judge during the trial and, as in othere provinces, prepare a written report and

> be subject to cross examination on his report either before or during the trial. The appointment of a court expert does not prevent the parties from calling their own experts at trial.

McDonald (1978) suggests that this practice has not been welcomed by the legal profession. There is, he suggests, a possibility that a judge sitting alone may give undue weight to the opinion of the expert that he has chosen. Likewise, it is a possibility that a jury may also favour the opinion of the expert chosen by the judge. It is also remotely possible that reliance on court appointed witnesses could lead to a reduction of the role of the lawyer as advocate and fundamentally change the philosophical concept of the trial.

Since a judge has, in many courts, the opportunity of appointing his own expert, it appears that the judge should not take into consideration facts or opinions not presented in evidence at trial, and not within the scope of information of which the court can take judicial notice. In R. v. Haines (1980) the trial judge did this, by relying on literature not presented at trial. On appeal, Perry Co. Ct. J. stated (R. v. Haines 1980: 426):

> In reaching his conclusion as to aboriginal rights the learned judge relied on his own private researches, including, I may say, an unpublished Ph.D. thesis written at the University of Washington in 1953. There was no evidence as to the expertise

> or quality of scholarship of the writer of that doctoral dissertation. He relied on various other texts from which he drew a series of conclusions as to historical facts. None of these works was entered as an exhibit. They were not put to any witness, nor revealed to counsel. No expert witnesses were called. However extensive the doctrine of Judicial notice may be, in my opinion it was error in law for the judge to consider these publications. . . it is clearly contrary to the rules of natural justice for a judge to rely on information obtained after the hearing was completed without disclosing it to the parties and giving them an opportunity to meet it.

In Baker Lake v. Minister, the Federal Court judge applied personal impressions he gained from a visit to the community to his judgement. He stated (1980: 210):

> Some of the observations above concerning the physical features, institutions and facilities of the community will not be found in the transcript of the evidence. They are among the gleanings of personal observation and inquiry during the week the court spent in the community hearing the evidence of the Inuit witnesses. They are background information of a class known to the courts about communities in southern Canada, not immediately relevant to the issues but helpful to an understanding of them.

Here it appears that the judge was attempting to merely gain

a "feeling for" the way of life in a way similar to that which he, and other judges, have for the communities in which they live. It is questionable, however, whether most judges are really a part of or understand the life style of most litigants they face, and whether there was any bias or selective limitation in the community experience possible in a short visit. This issue was not addressed in this judgement, since it was not appealed.

The court, in most juristictions, may appoint its own expert when it deems it necessary, to assist in the explanation of scientific evidence. Such an expert does not replace those called by the parties, but adds an extra, supposedly unbiased, opinion. While it may be useful and necessary in some instances that such a witness be appointed when the parties do not call experts, when only one side has an expert or when the opposing experts are in total disagreement in their opinions, it would be extremely difficult for a judge to decide in advance when to call an expert for the court. While lack of the use of court appointed experts may occasionally result in poor judgments, overuse could have more serious effects to the legal process resulting from the court usurpting the function of the advocates.

Qualification of Experts

Before a court will receive the opinion of an expert witness, it must determine that the witness is indeed an

expert in regards to the subject matter of the opinion. In the absence of the consent of the opposing counsel, the solicitor calling the expert witness must lead evidence which shows that the expert is properly qualified to give opinion evidence. This may be done in a voir dire[3] or as a part of the trial. Usually the curriculum vitae of the witness is entered as an exhibit. The witness is usually led through questions concerning his education and practical working experience in regards to the subject matter in issue. The opposing counsel may cross examine on the issue of qualification of the witness and should do so before any evidence is given, since if this preliminary objection as to qualification is not made, any subsequent cross examination goes merely to weight and not to admissibility (McCalla 1981-82). It is up to the judge to make a finding which qualifies the witness as an expert (R. v. Marks 1952).[4]

An early case gave what may possibly be the first definition of who may be qualified as an expert (R. v. Silverlock 1894: 771):

> The question is, is he peritus? Is he skilled? Has he an adequate knowledge? Looking at the matter practically, if a witness is not skilled the judge will tell the jury to disregard his evidence.

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[3]A "voir dire" is a "trial within a trial" in which evidence is given in regards to a matter concerning the admissibility of certain evidence or the suitability of a particular witness to give specific evidence.

[4]Note that this function appears to be statutorily removed in B.C. where the Evidence Act, s. 10(4) states: The assertion of qualifications as an expert in a written statement is proof of the qualification.

An expert witness must clearly be skilled in the particular area at bar. In R. v. Bunniss, a case which introduced a police officer as a breathalizer expert, the court held that skill is the most important aspect (1964: 264):

> . . . it is clear that so long as a witness satisfies the Court that he is skilled, the way in which he acquired his skill is immaterial. The test of expertness, so far as the law of evidence is concerned, is skill, and skill alone, in the field in which it is sought to have the witness's opinion to be received, then his opinion is admissible.

The court went on to say that a university degree from a professional faculty was not essential to this acquissition of skill.' The lack of a degree, however, would go to the question of weight of the evidence.

In R. v. Morgantaler (1973) the court held that an expert may be qualified as such, when the qualification has been obtained either by study or by practical experience. In this case a doctor who had not practiced medicine for ten years, had no further university studies or teaching and had not published in the field of her evidence, was qualified as an expert since she was a qualified doctor, had practiced and was entitled to practice, and was active in the area of family planning, read current literature and lectured at a college.

'This may be a means of introducing more native witnesses as experts on Indian culture and life ways.

The importance of practical experience in addition to education is best illustrated by the case of Brownlee v. Hand Fireworks where the expert was declared by the court as not qualified. The witness was a university professor in applied mechanics and structural engineering and who had lectured the Canadian Officers Training Corps on the use of high explosives, who was asked to give evidence in regards to fireworks. The court held (1931: 133):

> A persual of his evidence does not disclose that he has ever had any experience in respect of either the manufacture or the setting off of fireworks displays. In respect of the latter his experience, if one may judge from his testimony, is rather less than more than any one of the majority of the younger generation who have had the handling of firecrackers, sky-rockets, etc. Strictly speaking, he was not properly qualified to give expert testimony upon the question which was involved here, namely, the manufacture and use of fireworks.

This case would indicate that practical experience must be specific to the issue in question, at least in regards to technical or scientific matters. Such was the case in Baker Lake v. Minister where the court held that a witness formally trained as a geographer who had experience in and with the Artic and Inuit, was not qualified "to form opinions on political, sociological, behavioural, psychological and nutritional matters admissible as expert

evidence in a court of law" (1980: 222). He was, however, qualifed as an expert in geography and was allowed to reach economic conclusions based on that competence.

The qualificaton of a witness is dependent both on education and experience, and the importance of each aspect depends on the type of opinion to be given at the trial. The issue of qualification is important and must be addressed before any evidence is admissible. Any question as to the relative education and experience of opposing experts will go to the weight assessed to their evidence by the judge.

Hearsay

The hearsay rule in evidence "specifies that evidence of a statement made by someone other than the testifying witness is inadmissible if the only purpose of introducing the evidence is to prove the truth of the statement made" (Stenning 1969: 183). It is clear that experts, like any witness, may not give hearsay evidence. However, as Sopinka and Lederman explains, there is a large hearsay element in the evidence of experts (1974: 316):

> Although it has been asserted that the expert's opinion must be based upon either personal knowledge or facts presented at trial, it cannot be completely devoid of a hearsay element. Since the expert by definition possesses a special skill or knowledge in a material area superior to that of the court, his expertise is founded to a large extent upon hearsay

> data. An expert will base his opinion upon his own experience and upon whatever education he has received. The latter is naturally comprised of the study and readings of works of authorities in the field and information and data culled from numerous sources. Thus, an expert's knowledge is made up of the distilled assertions of others not before the court.

The element of hearsay is particularly obvious in the evidence of psychiatrists who make opinions based on examinations conducted before the trial. In the case of anthropologists many of the opinions they form come from information received from informants during pre-trial preparation or from independent research conducted some time before the trial.

After determining that such opinions are admissible, the question that arises is, should the expert be permitted to state the details of the hearsay facts that he relied on. Since an opinion is only as good as the information which it is based upon, such facts are admissible, not to show their truth, but only to show the basis of the expert's opinion. This rule may be more critical for medical and psychiatric experts who base a great deal of their opinion on the statements given by their patients than for social scientists who often make observations of the actions and interactions of the groups they observe and may use statements only as supporting facts.

Factual Base

There is a concern that an accused may be prejudiced when an expert's opinion is accepted without proof of the facts used as the basis of the opinion (McDonald 1978: 330-331):

> Facts may be placed before the trier of fact which are not proved by admissible evidence but which are disclosed by the expert as a basis for his opinion. . . . Many such facts will, of course, be inconsequential in relation to the ultimate issue. However, if the fact disclosed is one which is directly relevant to an issue, its disclosure, without proof by admissible evidence, may be highly prejudicial to the opposite party.

The expert is usually asked to state the facts upon which he basis his opinion. They may be obtained by reading literature in the field of study of the expert, by personal knowledge of the matter (such as an examination of a deceased person, scene of an accident, or the accused), or by being present in the court throughout the trial to hear the evidence of the facts in issue.

It is often impractical or impossible to prove all the facts upon which an expert's opinion is based. In a case involving the opinion of a land appraiser, the court realized that it was not possible to prove all the facts upon which the opinion was based, and stated (St. John v. Irving 1966: 414-415):

> To characterize the opinion evidence of a qualified appraiser as inadmissible because it is based on something that he has been told is, in my opinion, to treat the matter as if the direct facts of each of the comparable transactions which he has investigated were at issue whereas what is in truth at issue is the value of his opinion.
>
> The nature of the source upon which such an opinion is based cannot, in my view, have any effect on the admissibility of the opinion itself. Any frailties which may be alleged concerning the information upon which the opinion was founded are in my view only relevant in assessing the weight to be attached to that opinion . . .

The judge or jury* should decide if the factual basis of the opinion has been proved and then decide on the weight to be given to the opinion (McWilliams 1974). This assumes that the judge or jury are well enough informed to make such an assessment of the opinion. Uncontradicted expert opinion may induce the acceptance of the opinion since the opposing side did not contest it, but the judge or jury is not bound to accept it, especially if its factual base has not been proved.

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*Cases may be tried by a judge alone who would make decisions of fact and law; or by a judge and jury in which case the jury decides the facts and the judge applies the law to those facts.

Hypothetical Question

When an expert has heard uncontradicted evidence in the courtroom he may be asked his opinion directly; where, however, the expert lacks personal knowledge of the issues in question or the facts are in dispute, the expert may only be asked his opinion by means of a hypothetical question (Sopinka and Lederman 1974). The Supreme Court of Canada stated this as follows (Bleta v. R. 1964: 141):

> . . . it is because the opinion of an expert witness on such a question [of fact] can serve only to confuse the issue unless the proven facts upon which it is based have been clearly indicated to the jury that the practice has grown up of requiring counsel, when seeking such an opinion, to state those facts in the form of a hypothetical question. In cases where the expert has been present throughout the trial and there is conflict between the witnesses, it is obviously unsatisfactory to ask him to express an opinion based upon the evidence which he has heard because the answer to such a question involves the expert in having to resolve the conflict in accordance with his own view of the credibility of the witnesses and the jury has no way of knowing upon what evidence he based his opinion. Where, however, there is no conflict in the evidence, the same difficulty does not necessarily arise and different considerations may therefore apply.

The hypothetical question when carefully phrased with all the relevant facts, gives the court a clear understanding of the basis for the opinion and assuming the facts of the hypothetical question are the facts found in the case, makes the opinion a potentially valuable assistance to the court.

Ultimate Issue

There was a general rule that an expert may not give an opinion on the "ultimate issue" which the trier of fact, be it judge or jury, must decide. This rule has been abandoned or rejected recently except that the courts will not permit an opinion on a question of law (McCalla 1981-82; R. v. Graat 1981), and each case will be examined on its own particular circumstances to determine if the rule should be applied (Maloney and Tomlinson 1972). The reason for rejection of opinion evidence on the ultimate issue has been stated by the Supreme Court of Canada in R. v. Fisher as (1961: 19):

> In some cases where opinion evidence has been rejected, the ground given is that the giving of the witness's opinion usurped the function of the jury. In other decisions it is said that the evidence tendered constituted an opinion upon the very point or issue which the jury had to decide. An examination of these authorities, however, discloses, in my view, that the jury or the Judge, in cases tried without a jury, would have had no

> difficulty in arriving at a proper conclusion in the absence of the tendered opinion and that this was the true ground for its rejection.

There are thus two reasons given for rejecting the admission of opinion evidence, one that it permits a witness to decide the issue of the case in place of the trier of fact, and the second, that the evidence is not necessary and is superfluous.

While it may be so rejected, opinion will be allowed in other circumstances. If there is no injustice resulting nor a miscarriage of justice opinion evidence on the ultimate issue may be admissible. In a case in which the accused was convicted of driving while intoxicated and dangerous driving, the trial judge allowed lay witnesses to give opinion evidence on the state of intoxication and manner of driving of the accused. In confirming the conviction, Hall, J.A.' stated (R. v. German 1947: 102-103):

> After carefully reviewing all of the evidence of the various witnesses, I am of the opinion, with all respect to the trial Judge, that he permitted some questions to be asked which resulted in witnesses expressing opinions on matters which are strictly reserved to the jury. However, on the whole, I am unable to find that there could have been any miscarriage of justice resulting therefrom.

'J.A. after the name of a judge means he is an Appeal Court Justice; J. means Judge of a trial court; C.J. means a Chief Justice.

If an opinion which goes to the ultimate issue is relevant to the case of the party putting it forward it may be admissible. In a criminal case the accused wanted his psychiatric witness to give his opinion as to whether or not the accused would engage in a homosexual act, and the evidence was rejected as inadmissible by the judge. The Supreme Court of Canada stated that (R. v. Lupien 1969: 179):

> Accordingly it follows that the evidence of psychiatrists is particularly relevant in cases involving homosexuality and the admissibility of opinion evidence from psychiatrists must be determined by its relevancy to the matter in issue at the trial. In the present case the learned trial Judge admitted all the evidence being tendered by Dr. Newman except the opinion he was prepared to give to the effect that Lupien's normal personality and his defence mechanisms would cause him to reject homosexual advances and that he would not knowingly have engaged in them. Dr. Newman was allowed to answer the hypothetical question put to him based on the assumption of the truth of the evidence adduced at the trial but was not permitted to give the opinion above set out based on tests made by and for him and in conversations with Lupien.
>
> It is a question where the line between admissibililty and inadmisibility is to be drawn. If

> the evidence was relevant to the defence being put forward on behalf of Lupien, and I think it was, then it was admissible and the learned trial Judge erred in rejecting it.

Despite this error the Court upheld the conviction since the remainder of the evidence was so overwhelming and no substantial wrong or miscarriage of justice had occurred.

The cases, thus, state that opinion evidence on the ultimate issue will be inadmissible if it usurpts the function of the trier of fact or is superflous, but may be admitted if it is relevant or if no injustice results therefrom. The Ontario Court of Appeal decided in R. v. Graat that the issue was settled (1980: 157):

> In Canada the ultimate issue doctrine may now be regarded as having been virtually abandoned or rejected. Where evidence has been rejected on the basis of the doctrine, such rejection can be explained on other grounds. In some instances the opinion evidence should be rejected because the trier of fact, whether Judge or jury, is just as well qualified as the witness to draw the necessary inference. Accordingly, the non-expert testimony is superfluous, as it is of no appreciable assistance to the Judge or jury. Alternatively, the admission of evidence on the ultimate issue can be justified on the basis that the witness is an expert and the Judge or jury requires his assistance. . . . Even if

> the expert might be considered as usurping the jury's function, the court did not think that it was justified in excluding [the expert's] evidence. In the final analysis, even with the benefit of the expert's evidence the jury still has to make the final determination of the issue, so that the expert is not really usurping the jury's function.

Examination of the Expert Witness

The object of the party who introduces the evidence of an expert is to establish the qualifications of the witness as an expert in the exact area in which he will be giving evidence, and to obtain direct or opinion evidence supporting that side of the case. In the direct examination of an expert use may be made of the hypothetical question as discussed above. Texts and scholarly writings may also be employed. While the hearsay rule precludes them from being introduced as evidence, an expert may refer to such writings, or counsel may read extracts which the expert agrees forms the basis of his opinion. "The written view of the author thereby becomes the opinion of the witness" (Sopinka and Lederman 1974: 326). The use of texts was discussed in an appeal on a murder case involving the defence of insanity in which medical expert evidence was given. Harvey, C.J. stated (R. v. Anderson 1914: 459):

> As all evidence is given under the sanction of an oath or its equivalent, it is apparent that

> text-books or other treatises as such cannot be evidence. The opinion of an eminent author may be, and in many cases is, as a matter of fact, entitled to more weight than that of the sworn witness, but the fact is that, if his opinion is put in in the form of a treatise, there is no opportunity of questioning and ascertaining whether any expression might be subject to any qualification respecting a particular case. A witness would not be qualified as an expert if his opinions were gained wholly from the opinions of others and the faith that is to be given to the opinion of an author of a treatise must come through the faith in the witness and the confidence to be placed in the witness's opinion, in theory, is not to be derived from the confidence in the author with whose opinion he agrees. On principle, therefore, nothing may be given from a text-book, other than as the opinion of a witness who gives it.

Beck, J. in his reasons for judgment on the same appeal stated (1914: 476):

> When a medical man or other person professing some science is called as an expert witness, it is his opinion and his opinion only that can be properly put before the jury. Just as in the case of a witness called to prove a fact, it is proper in direct examination to ask him not merely to state

> the fact, but also how he came by the knowledge of the fact, so in the case of an expert witness called to give an opinion, he may in direct examination be asked how he came by his opinion. An expert medical witness may, therefore, upon giving his opinion, state in direct examination that he bases his opinion partly upon his own experience and partly upon the opinions of text-writers who are recognized by the medical profession at large as of authority. I think he may name the text-writers. I think he may add that his opinion and that of the text-writers named accords. Further, I see no good reason why such an expert witness should not be permitted, while in the box, to refer to such text-books as he chooses, in order, by the aid which they will give him, in addition to his other means of forming an opinion, to enable him to express an opinion; and again, that the witness having expressly adopted as his own the opinion of a text-writer, may himself read the text as expressing his own opinion.

An expert may, of course, be asked questions concerning any matter of which he has direct knowledge from his own research or observations. Often an expert will be asked by the counsel calling him to be present during the trial to listen to the other witnesses.

In regards to asking the expert to give an opinion based on the evidence he has heard at the trial of the case

problems can arise. In R. v. Neil, a case in which the court was required to determine if the accused, who had been convicted of gross indecency with two teenage boys, should also be convicted as a criminal sexual psychopath, the Supreme Court of Canada stated (1957: 16):

> It will be sufficient to state briefly the course of the examination of Dr. Michie by counsel for the Crown. Having proved his professional qualifications, counsel asked him if he had listened to all the evidence both on the trial of the substantive offences and on the hearing under s. 661(1). The witness having answered in the affirmative, he was next asked whether he had listened for the purpose of determining to himself whether the accused was a criminal sexual psychopath. His answer was "Yes". He was then asked if he has "arrived at a decision". His answer was "Yes"; and he was then asked to make his decision known to the Court. . . .
>
> The objections to such a method of examination are obvious. The witness is being asked to weigh conflicting evidence; the Court does not know, for example, whether he accepted as true the evidence of Stapley, as to acts of *fellatio* and sodomy, which was denied by the respondent and which counsel for the appellant did not ask this Court to accept. The witness may have disbelieved the testimony of the

> respondent *in toto*. The witness could not be expected to know the rules as to weighing the evidence of an accomplice or to appreciate the significance of the respondent not having been cross-examined. The Court is unaware of the foundation of assumed facts on which the opinion of the witness was based. The witness is also, in effect, being called upon to interpret the definition contained in s. 659(b), a task the difficulty of which is emphasized by the different submissions as to its meaning made by counsel in the course of the argument before us.

This case demonstrates the importance of the use of the hypothetical question in the examination of the expert, and shows that an expert cannot be asked to give an opinion on an issue of law.

Cross Examination of the Expert Witness

The purposes of cross-examination are to elicit facts from a witness not entered during examination in chief, to clarify statements made by the witness in his first examination and "to contradict the statements the witness has made by reference to other facts or written statements which he is bound to admit, and so throw discredit upon his memory or veracity generally"(Keeton 1943: 22). A witness under cross-examination may be questioned not only on the facts of the case itself, but upon any matter that effect

the credibility of the witness.

Since most expert evidence is given by opinion and not by statements of relevant fact, the most effective way to cross-examine is to attack the credibility of the witness' opinion. One method as suggested in an early advocacy text is to cause the witness to make unreasonable statements. Wrottesley suggested the following as a tactic (1910: 94-95):

> The best method of examining witnesses of this character is to take advantage of their enthusiasm in the cause of the party whose side they are to maintain, and quietly and gradually lead them to an extreme position which can neither be fortified nor successfully defended. They usually take pleasure in imparting their knowledge to others while upon the stand. . . and this fondness for display and love of approbation will often cause them to get into very deep water: but in order that the advocate may accomplish his purpose he must conceal the object he has in view, and remain master of himself no matter how trying his situation may prove. He must, then, when he has led the witness to make statements which are improbable and unreasonable, ask him to explain his glaring inaccuracies, and if he attempts to equivocate or give evasive answers, sternly hold him to the issues involved. In this way many experts are completely broken down and their testimony is

> rendered worthless to the side for which they are called.

This is probably not so easily accomplished today with many experts being not only experts in their field of study, but "experts" at being witnesses. Persons being called as an expert for the first time, especially those in the social sciences who may be morally committed to the side that calls them, hopefully will be well coached by counsel before being called to the stand.

A second way to discredit the opinion of the expert is to call into question the facts upon which he based his opinion. If the facts are hearsay this goes to the weight of his evidence (McWilliams 1974). Another tactic that may be used is to put a question to the expert based on slightly different facts and obtain from him a veried form of his opinion. Napley says of this (1974: 119):

> Experts for the most part are dealing with matters which can be the subject of differing opinions. If the subject matter of their evidence is something of scientific exactitute, then you are unlikely to get very far with cross-examination in any event. You should therefore endeavour to raise new facets or approaches to the problem which they have to consider, and endeavour to persuade them that if the facts which you are putting to them are accurate then the conclusion which they have reached would have to be modified or changed as a result.

A final way to discredit the expert's opinion by reference to the material on which it is based is to present to him an opinion from a text at variance with the one that he has presented to the court from the same book. In R. v. Anderson the court stated (1914: 476-477):

> In cross-examination an expert medical witness having first been asked whether a certain text-book is recognized by the medical profession as a standard author and having said that it is, there may be read to him a passage from the book expressing an opinion, for the purpose of testing the value of the witness' opinion. I adopt the words of Tuck, J. (31 NBR 595).
>
> "I think an expert may be examined as to what is in the books. Medical works are produced which are recognized by the profession as standard authorities. An expert witness is being examined, who gives evidence as to specific diseases and their remedies. It is found by reference that his statements are at variance with what is laid down by the best authors on the same subject. Surely, it must be the right of counsel to confront the witness with books written by scientific men, leaders in their profession, for the purpose of shewing either that the witness is mistaken, or that he may explain and reconcile, if he can, the real or apparent difference between what he has said and what is

> found in the books. If it was otherwise, men of insufficient learning, or veritable quacks, might palm off their crude opinions as scientific knowledge. There is a marked difference between reading what is in a book as evidence to a jury, and testing a witness when examining him by reading to him from the same book. In the one case, you are reading as evidence what, afterall, is only the opinion of a scholar, however learned he may be, without an opportunity to cross-examine him. In the latter, you are testing the opinion of one expert by the writings of another, admitted to be of high authority. It may be that the author's views are placed before the jury as effectually in one way as in the other; but, in my opinion, one way is objectionable, the other is not."

By these methods of questioning the basis of the expert's opinion, cross-examination can diminish the impact of the testimony.

Finally, the credibility of the witness may be put into question by showing that he has previously made statements inconsistent with his evidence given at the trial. For non-experts such inconsistent statements are generally oral or in informal writing such as letters. For the expert, however, statements inconsistant with the opinion at trial may exist in his published work. A solicitor who has done his homework, may find earlier conflicting works and call

them to the attention of the witness and thus show him to appear biased or that his present evidence is unreliable. A witness may deny having made a previous inconsistent statement, except when it is written and introduced at trial. The purpose of introducing evidence of an inconsistent statement according to Sopinka and Lederman (1974: 506) "is to impair the witness' credibility and thereby may have the effect of neutralizing the witness' testimony. It only goes to show that the witness is not one who should be believed."

The object of cross-examination is to reduce the weight given to the expert's opinion by lessening his credibility in the eyes of the trier of fact. An alternate opinion is put in by the introduction of evidence in chief of the expert on the opposite side.

Number of Expert Witnesses

The number of experts permitted at a trial is limited by statute, rules, or by the court. This is necessary to avoid unduly lengthy trials consisting of endless complimentary opinions by a multitude of experts. The rules do, however, allow for as many experts as are deemed necessary in the case.

The Canada Evidence Act (1970: s. 7) limits the number of professional or other experts called by any one side in a civil or criminal trial to five, without leave of the

court.'° New Brunswick (Evidence Act 1973, s. 23), Ontario (Evidence Act 1980, s. 12), Manitoba (Evidence Act 1970, s. 27) and Alberta (Evidence Act 1980, s. 10) all limit the number of experts any one side may call to three, without leave of the court. Saskatchewan (Evidence Act 1978, s. 48), however, permits five. In Nova Scotia the Rules of Practice (1972, r. 31.06) provide that the court may order that the number of expert witnesses, including medical doctors, to be called at a trial shall be limited. They also provide that if the court appoints an expert, each side may call one expert to give evidence on the issues addressed by the court expert, without leave (r. 23.05). Leave to call more than the limited number of experts may be made at the time when the witness is desired in all jurisdictions except Saskatchewan where the statute requires that leave be applied for before the examination of any of the witnesses who may be examined without leave.

Although the statutes state that three or five experts may be called on either side the question has arisen whether this means for the trial or for each issue on the trial. The Ontario Court of Appeal held in Buttrum v. Udell that the limit was three experts for the whole trial. Ferguson, J.A. gave as the reasons for this (1925: 100):

> I cannot find in the words of the statute any ambiguity or anything that allows us to give to the statute the limited or restricted meaning and effect

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'° "Leave" means permission.

> given it by the Alberta Court in *In re Scamen v. Canadian Northern Railway Co.* (1912), 6 DLR 142, or in this case by the trial Judge; and, with deference, I am of opinion that the remedy proposed by these Courts is worse than the disease, and that it is much better that the number of such witnesses called during a trial should be limited to three on each side, and such others as the Court may on application allow, than that the number of these witnesses should be limited only by the number of issues of fact that may actually arise in the course of a trial, or that counsel can with some show of reason argue will arise or have arisen during the trial. If the latter interpretation be given the statute, or if the words "opinion evidence" be given the meaning and effect suggested by my brother Hodgins, a trial Judge could not refuse to hear any such witness, because, before hearing what the witness had to say, he could not satisfactorily determine to just what issue of fact the evidence was applicable, or whether the evidence would amount to "opinion evidence," and thus the statute would, I think, either become a dead letter or a new source of trouble, expense, and delay.

This matter was decided by the Supreme Court of Canada. The Court in Fagnan v. Ure (1958) followed the Alberta decision rejected by the Ontario Court of Appeal. The court held that

since the Evidence Act was re-enacted in its same form in revised statutes after the decision of the court, it should be taken as legislative sanction of the judicial construction of that section. There may be called by any one side, without leave, three expert witnesses on each issue, and not for the whole trial.

If a judge fails to follow the provisions of an Evidence Act, by allowing more than the limited number of experts to testify without leave being granted, it was held to constitute a mistrial, and a new trial was ordered (Rice v. Sockett 1912).

In order to determine whether a witness is an expert as contemplated by a statute he should possess some special knowledge. An example of a test that might be appliled was given in Buttram v. Udell as (1925: 100-101):

> I do not think it wise to attempt to define what is "opinion evidence" within the meaning of the statute, for it seems to me the definition should, to some extent, vary with the circumstances of each case. However, I think I should indicate my view, which is that the statute has reference to opinion evidence founded in part or in whole on some special knowledge or qualification not possessed by the ordinary witness. For instance, if the mental capacity of a testator were in issue, and his closest friend or business associate were called and expressed an opinion founded on his acquaintance

> with the testator, I think that the statement of such witness would not be opinion evidence within the statute. On the other hand, if the testator's physician were called and expressed an opinion, founding his statement in part on his knowledge of the testator's habits and acts and also in part on his special knowledge of mental diseases, the statement of such physician would, I think, be opinion evidence within the statute, because his opinion is founded on a special knowledge or qualification not possessed by the other witness.

In R. v. DeTonnancourt the Manitoba Queen's Bench held that (1959: 28): "In determining whether testimony falls within the section, the court must look not only to the witness himself, to consider whether he is a professional or other expert, but even more to the character of his evidence, to decide whether it is in the category of opinion evidence." A constable who had specialized skills was found not to be an expert witness. These skills made his testimony more graphic and had a bearing on its accuracy, but did not give his testimony the character of opinion evidence. Likewise, if a witness has personal knowledge of a practice relating to factual evidence given at trial, and relates a description of that practice it does not make him an expert under these limiting sections (Fagnan v. Ure 1958).

Although there are limitations on the number of experts that may be called in some jurisdictions, leave to increase

that number may be given. It is also possible when the issues involved necissitate social scientists as experts, that witnesses may be called who have personal knowledge of the matters, from their experience as members of a special community, and these will not be counted among the experts, thus allowing a greater amount of evidence to be tendered.

Admissibility of Expert Evidence

As discussed above the opinion evidence of an expert will be admissible if the expert is qualified in the area and if the evidence given does not usurpt the function of the trier of fact and is not superfluous. The Supreme Court of Canada, in Village of Kelliher v. Smith, held that two elements must co-exist to make expert testimony admissible. These were: firstly, the subject matter must be beyond the knowledge of ordinary people who could not make a correct judgment without assistance; and secondly, the expert witness must have gained his knowledge by education and practice. The exact form of the education of the witness, whether he is a university graduate or not, goes merely to weight and does not affect the admissibility of his testimony (R. v. Bunniss 1964).

It was held in R. v. Fisher (1961) that in psychiatric opinion evidence, the fact that a doctor did not examine the accused personally, could have no bearing on the admissibility of his opinion evidence regarding the state of mind of the accused.

Opinion evidence that involves what is a mixed question of law and fact, however, is not admissible (R. v. Fisher 1961).

Once a trial judge has decided the issue of admissibility of opinion evidence by an expert, a court of appeal should not interfere with that decision without good reason. The Supreme Court of Canada stated in Bleta v. R. (1964: 144):

> . . . the decision as to whether a sufficient basis has been laid for the admission of an expert opinion rests in each case in the discretion of the trial Judge, the exercise of which is dependent upon many factors, all of which may not be fully appreciated by a Court of Appeal which is confined to the printed record of the proceedings in its reconstruction of the atmosphere existing at the trial. For this reason, in cases where the evidence is open to the construction that the premises upon which the expert opinion is based were clearly presented to the jury, a Court of Appeal should, in my opinion, be hesitant to interfere with the ruling made by the trial Judge as to the admissibility of that opinion.

A different finding was made by Ritchie, J. in Workmen's Compensation v. Greer when he stated (1973: 602-603):

> I appreciate that this conclusion differs from that reached by the trial Judge and two of the three

> Judges sitting in the Appeal Division, but no question arises as to the veracity of the witnesses and the judgment of the majority of the Appeal Division is based on inferences drawn from conflicting medical opinion so that this is a case which appears to me to be governed by the language used by Lord Halsbury in *Montgomerie & Co., Ltd. v. Wallace-James*, [1904] A.C. 73 at p. 75, which was affirmed by the Privy Council in *Dominion Trust Co. v. New York Life Ins. Co.*, [1919] A.C. 254 at pp. 257-8. Lord Halsbury said in part:
>
> ". . . where no question arised as to truthfulness, and where the question is as to the proper inferences to be drawn from truthfull evidence, then the original tribunal is in no better position to decide than the judges of the Appellate Court."
>
> In my opinion, the practice of this Court, which reflects a reluctance to interfere with concurrent findings of fact in two provincial Courts, does not apply with the same force to inferences drawn from conflicting professional opinions as it does to findings based on direct factual evidence.

An appeal court thus may decide which opinion evidence it will rely on in the absence of any evidentiary reason to reject one in favour of the other.

Weight Given to Expert Evidence

Once evidence is deemed admissible, the trier of fact must decide on what weight to assess it relative to opposing evidence. It is clear that a jury may reject altogether the evidence of an expert and are not in any way bound to accept it (R. v. Fisher 1961; Bleta v. R. 1964). Stenning says of weight (1969: 188):

> The weight which a jury will attach to an expert's opinion will, of course, depend upon the degree of relevance he can establish for it, and the extent to which he can convince the jury of its validity. This will involve him in many cases in going into explanations of the information on which his opinion is based, and the manner in which it was formed. To the extent to which the expert witness is able to satisfy the jury in these matters, his evidence will be treated as being of greater or lesser importance.

The weight assessed will be affected by the facts posed for a hypothetical question (R. v. Fisher 1961), the level of qualification and experience of the expert (R. v. Bunniss 1964), and the information upon which the expert based his opinion (City of St. John v. Irving 1966).

D. Conclusion

Clearly most anthropologists would qualify as experts within the legal requirements of the law of evidence. There are many types of cases which could benefit from the information and opinion of social and cultural anthropologists, including those concerning hunting as a way of life, land claims, custody and adoption. In addition to these substantive issues anthropologists would be useful as consultants in the preparation of pre-sentence reports for persons from other indigenous or immigrant cultures who were convicted of any criminal offence. The law of sentencing attempts to make the punishment fit the criminal, not the crime, and anthropological insight into community standards, family and social control, and informal behavior regulatory systems within other cultural communities would aid this effort.

While the use of hypothetical questions may be difficult to frame in cases which explore community practice or standards, such as hunting, this technique could be applied to adoption or custody cases concerning one individual with known characteristics.

The basis of the information relied on by anthropologists contains some element of hearsay and the methodology employed may result in challenges as to it being "factual" in nature. The courts have not as yet disputed these features of anthropological evidence, but as more cases are heard these will be two areas that anthropologists

will have to be prepared to justify.

The rules of evidence as they exist are adequate in allowing anthropological experts to testify at the present time. As more cases involve anthropologists it may be found that some modification is required in respect to the lessening of the requirement for the hypothetical question and a clarification of classes of experts for particular issues or cultural groups.

III. HISTORY OF THE USE OF SOCIAL SCIENCE EVIDENCE

A. Introduction

This chapter will outline a brief history of the introduction of social science evidence into the courts. This brief outline will focus on the major events which demonstrate that there has been a constant growth in the use of social scientists within the court system. Social scientists have played an important role, especially in recent years, in the total legal system by providing information to commissions, boards of inquiry, law school courses, government committees and task forces. These areas of law although important to the total system are not within the consideration of this thesis and will not be included in this discussion.

This history of the court acceptance of social science expert testimony will only outline the areas of law and social science and the sequence of the relationship. It will not discuss the sociological ideologies or theories as accepted by and included into the application of law. This is beyond the scope of this thesis which is focusing on the relationship, rather than the particular subject matter of any case or cases. Although much of the law of expert witnesses was developed through the appearance of medical, psychiatric and scientific evidence, this development will also not be emphasised. This area has been discussed elsewhere (Louisell 1955; Malcolm 1979; Posluns 1981;

O'ttoski 1976-77).

While the focus of this thesis is the relationship between the courts and social science experts in Canada, this chapter will include an overview of the early history of experts in British law and the development of the relationship in the United States. This is included to give a broad picture of the development, and because developments in these jurisdictions often effect developments in Canada. The development of the use of social science evidence in Canada will be developed by an examination of the major reported cases.

B. Early History

It is impossible to determine now because of the lack of records if use of experts in early times was an innovative technique of a creative judge or something that was commonly employed. In early times because population was small it was likely that members of a community were quite familiar with each other and their affairs. Discussions of cases coming up in court among the members of the community would have provided a means for the trier of fact to get "expert" information in an informal way that could be applied at the trial. This of course is merely speculation. Whatever the case was, formal developments started early. Two such developments were the creation of the specialist jury and the introduction of expert witnesses.

The first reported instance of the use of a specialist jury to assist a court in the determination of a case occurred in England in 1554 when the assistance of scientific information was recognized. In a later case in 1654 a jury of merchants was sumoned to decide a dispute between merchants (Hand 1901). The practice of appointing special juries became an institution of early English law that was given statutory force in 1730 as a right that either party could demand. The special jury later developed into a relationship between law and commerce and is still a part of English law, although not commonly employed (Beuscher 1941).

A second development was the use of court appointed experts who assisted in making decisions on cases concerning special issues such as maritime cases. Such experts were called as early as 1345 in a case where a doctor assisted the court in the determination of the freshness of a wound. In 1492 and again in 1555 the court obtained the assistance of "masters of grammar" for the determination of cases, and in 1620 a doctor was called to give evidence in regards to gestation in a legitimacy case (Hand 1901). The practice continued and expanded into the King's Bench when a maritime expert was called in 1648 (Beuscher 1941). The use of expert witnesses continued and became more important as medical, scientific and technical knowledge grew. It became increasingly important that specialists give information to courts on matters beyond the knowledge of not only the

ordinary person, but beyond otherwise educated people in different fields. The development continued in England to present times.

C. Development in the United States

There has been very important breakthroughs in the use of social scientists as court experts in the United States. The legal application of social science information has changed the course of legal history and affected the lives of all Americans, some in very positive and important ways. These changes have come about in many areas. The most important area was the the school segregaltion cases. Other areas include trade marks, religion in school, pornography and environment. Indian land claims is also an important social area but these are often heard pursuant to specific legislation or by special tribunals (Jones 1955).

The earlist consistant use of social science evidence was in trade mark cases. These cases employed experts who introduced public opinion analysis to show if there was a general confusion between products identified by similar trade marks (Greenberg 1956). Other areas in which social science experts have been used are pornography and environmental studies.

The school segregation cases resulted in the greatest development of social science expert testimony. Clark (1953) described three periods. The first from 1896 to 1930 was dominated by the doctrine of separate but equal education.

During the 1930 to 1945 period, the second phase, the legal battle was to admit Negro students to white educational institutions that had no Negro counterpart such as graduate and professional schools. The final stage was from 1945 to the present and was an attack against segregated education. One of the first cases, according to Clark, was the 1946 case of Sweatt v. University of Texas.

> The Sweatt case was the first of these cases in which expert social science testimony was presented and became a part of the argument and the legal record. Robert Redfield, anthropologist of the University of Chicago, testified that: "given a similar learning situtation a negro student tended to react the same as any other student and that there were no racial characteristics which had any bearing whatsoever to the subject of public education." This testimony was relevant to the argument that the segregation of students on the basis of race was an arbitrary and unreasonable classification (Clark 1953: 6).

This new line of approach resulted in an extensive use of social science evidence in these cases (Wisdom 1975; Rosen 1977).

The most famous, and possibly the most important, of the cases was Brown v. Board of Education (1954). The social science evidence, organized by Kenneth B. Clark, "was crucial in supplying evidence that segregation itself meant

inequality" (Wisdom 1975: 138). This case which held that segregation does "have a detrimental effect on colored children" (Rosen 1977: 560) and denoted inferiority of that group created a great controversy between the opposing factions. Wisdom noted that this caused some difficulty in using social science experts (1975: 139):

> The road is not smooth for the use of social science evidence in the courts. Testimony of experts for the plaintiffs forces the defendants to come forward with experts. If the trial is prolonged and played up in the communications media, the public impression is that the court is elevating sociology at the expense of law. . . .
>
> Segregationists, to a man, criticized the Supreme Courts's holding in *Brown* as one that was based on sociology rather than law, as if the two must be antithetical rather than closely related or complementary.

These cases demonstrated that social science evidence can be extremely useful to courts to correct social wrongs or injustice not adequately covered by the law. Greenberg concluded "if the testimony played any role it was a "legislating" one, in the change from one rule of law to another" (1956: 965).

D. Development in Canada

The use of social science expert witnesses has developed slowly. As seen in Chapter Two the law of expert witnesses has developed mostly by the use of "hard" science, medical science and psychology experts. Three areas of use of social science experts have arisen: trade marks, obscenity cases and cases involving issues of Indian culture.

In regards to trade marks expert evidence of a survey conducted to examine consumer and dealer knowledge of a trade mark was accepted in the case of Aluminum Goods v. Registrar (1953). The court allowed the Canada-wide registration of the trade mark because the survey found "91 per cent of the 3007 housewives and 96.5 per cent of the dealers identfied "Wear-Ever" as a brand" (1953: 83). This survey evidence satisfied the onus required by the applicant.

In regards to cases dealing with obscenity public opinion polls to determine community standards were used as evidence in a number of cases. Experts can be heard on the artistic and literary qualities of publications that are accused of being obscene (R. v. Brodie 1962).

Obscenity charges require that the material be beyond community standards. The evidence of one witness is not enough to define community standards but that of an expert can be. In one of the first major cases on this point, R. v. Great West News, Dickson, J.A. stated (1970: 314-315):

> . . . the Courts have not found it necessary to call upon expert testimony to describe the standards of the community. Such evidence is, of course, admissible but that is not the same thing as saying it is essential.
>
> . . . I do not find in *Brodie*, or elsewhere in the Commonwealth, any majority opinion that expert evidence of community standards is an essential ingredient to a finding of guilt. If any inference can be drawn from *Brodie* it is that the Judge must, in the final analysis, endeavour to apply what he, in the light of his experience, regards as comtemporary standards of the Canadian community. In so doing he must be at pains to avoid having his decision simply reflect or project his own notions of what is tolerable.

This same court, in the same year, set out a test for the acceptance of expert evidence on public opinion polls.

In R. v. Prairie Schooner (1970), Dickson, J.A. upon finding that there was little reference to public opinion polls in Canadian or English legal reports observed that no general legal rule was developed for their use. A change in attitude was noted, however. He stated (1970: 265-266):

> Basic to the admissibility of such surveys has been the acceptance of the public opinion polling as a *science* when approved statistical methods, social research techniques, and interview procedures are

employed.

> Essential to admissibility is the requirement that the witness testifying be possessed of expert knowledge. Essential also is selection of the proper "universe", ie., that segment of the population whose characteristics are relevant to the question being studied.

These cases have been followed in other parts of Canada (R. v. Times Square 1971; R. v. Pipelne 1971). The important issue relating to the issue of community standard is that the survey be scientifically conducted, be undertaken by an expert and relate to Canada as a whole.

There are only a few cases dealing with issues of Indian culture that used anthropologists as experts. One of the first to use an athropologist was the Calder case (1974) which employed Wilson Duff and an archivist. The decision in the case as to the extinguishment of aboriginal title arose from historical facts and documents rather than from social science considerations.

The Baker Lake case (1980) which held that the land in queston was subject to the aborignal right and title of the Inuit to hunt and fish used the expert evidence of two archaeologists, Elmer Harp and J.V. Wright, one acting on each side of the case. The court said of this (1980: 200):

> Their professional qualifications are impeccable. Dr. Wright's evidence was admitted as rebuttal evidence only. He did not cast any doubt on the

> validity of Dr. Harp's overview of the Inuit occupation of the North American Artic generally but, rather, dealt with the crucial question of the extent, if any, of Inuit occupation of the Baker Lake area prior to the historic period.

The court quoted extensively from the evidence of the two experts taking as fact their evidence of the history of the Inuit occupation of the area. An anthropologist, Milton J. Freeman, also gave evidence as to the present social organization and land use of the Inuit. This evidence, along with that of physical scientists, assisted the court in making its decision in favour of the Inuit.

Other cases which involved the use of anthropologists are discussed in Chapter Four. There have been very few reported Cases in Canada which used anthropologists as experts, but the precident for their use now exists.

E. Conclusion

The usefullness of social science, and in particular anthropological, expert evidence has been established. While it is a well developed area of law in the United States it has made only a foothold in Canada. The conclusion to Greenberg's paper seems an apt statement for Canada now (1956: 970):

> Over fifteen years ago, Robert S. Lynd wrote that "Social science is not a scholarly arcanum, but an organized part of the culture which exists to

help man in continually understanding and building his culture." A similar statement might be made of law. Fortunately, there is room for the two to work in combination.

IV. EXAMINATION OF SELECTED CASES

A. Introduction

There are very few reported cases using anthropologists as expert witnesses in Canada. Two have been selected for discussion in this chapter. These cases were selected primarily because of the accessability of transcripts of the trial. Getting transcripts is difficult since one must first be aware of the case, it must have been appealed, a procedure which requires that transcripts be ordered and paid for, and the counsel involved must be willing to make these available. The two cases examined here were both obtained from counsel who were co-operative in supplying access to transcripts, and willing to have their case examined by an outsider.

In addition to the availability of material, the two cases were chosen because they exhibit certain similarities that make them readily comparable, but also because the legal issues in each was different which resulted in differences in the use of the witnesses. The cases are similar in that at the time of this study they had both been to trial in the Provincial Court of British Columbia, and had been appealled to the County Court and Court of Appeal of British Columbia. Both cases have been set to be heard together at the fall sitting of the Supreme Court of Canada for 1984.'' Both cases involved status Indians who were

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''The Supreme Court of Canada gave its decision in late 1985. Although it was held that hunting was a way of life

charged with offences under the British Columbia Wildlife Act. In both cases counsel employed many native witnesses as well as an anthropologist as an expert witness. The cases differed in the following respects: all parties including counsel, accused, anthropologists, and witnesses differed on each case; the culture of the accused was different in each case, one involved Coast Salish and the other Shuswap people; and the defence used was different in each instance. Although the cases were similar in structure, that is the charges prosecuted and courts hearing the case, they differed in their form of presentation.

The strategy used by counsel in each case differed in how they used their expert witnesses. This legal strategy will not be analysed since it is impossible to second guess the reasons for it, and will add little or nothing to the purpose of this chapter which is to look at the contribution of the anthropologists. The anthropologists as witnesses have no control over the lawyer's actions.

This chapter will present each case separately with a discussion of the facts of the case, the legal issues involved, the use of Indian witnesses, judicial comments on the use of expert evidence and the disposition of the case by the courts. Each of these topics will be presented for completeness so the reader will have as full an understanding of the cases as possible. The chapter will conclude with a discussion and comparison of the use of the

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''(cont'd) for the Indians the provincial hunting laws applied to them.

expert witness in each case.

B. The "Tenale and Dick" Case

The Facts

On May 4, 1980 Augastine Tenale, Arthur Andrew Dick and three others, all non-treaty-Indians and members of bands of the Shuswap Indians of British Columbia, went fishing for food. On the way to Gustafsen Creek, the intended fishing spot, Dick shot and killed a deer, which he intended to use for food for the fishing party and other band members. The deer was killed off a reserve and they were found by the police off a reserve with the meat and other items. Later that day, the Royal Canadian Mounted Police, upon finding the men in possession of deer meat, dip nets and a number of rainbow trout, charged the individuals with hunting and fishing out of season.

The specific charges were as follows: Dick was charged with killing wildlife not within the open season, contrary to section 3(1) of the Wildlife Act, and with possession of wildlife that was dead during a closed season contrary to section 8 of the same act. All five men were charged with having taken fish from an inland stream during a closed period contrary to BC Reg 86/80 of the British Columbia Fishery (General) Regulations, made pursuant to the federal Fisheries Act.

The Legal Issues

There are two main legal issues in this case: one concerning hunting rights, and the effect of section 88 of the Indian Act and provincial legislation on hunting rights; the second concerning the power of the provincial government to enact regulations pursuant to the federal Fisheries Act. These formed two separate charges and trials but were heard together since the evidence was the same in each instance. The legal issues will be considered separately here.

The fishing charge involved a question of the validity of the provincial fishing regulations. The question to be answered was, did the federal Fisheries Act authorize a delegation of regulatory powers to the provincial minister. That is ". . . the question [was] not whether the Parliament of Canada may so delegate, but whether they did so in fact" (R. v. Tenale 1982:187-188). If it did, a conviction could be maintained under the regulations; if it did not, the regulations would be *ultra vires* and a conviction could not be sustained.[12]

The Fisheries Act contained no provision for the delegation of powers to the provinces. Section 34 permitted the Governor in Council to make regulations. In regards to this the court said (R. v. Tenale 1982: 188):

> While that section grants authority to the Governor in Council to make Regulations, it goes no further,

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[12] "Ultra vires" means beyond the powers of the government that enacted the law, and thus the law is not valid and of no force and effect.

> as to delegation, than to authorize delegation to "persons engaged or employed in the administration or enforcement" of the Act. I cannot conclude this to mean, or to have been intended to mean that the Governor in Council may, by Regulations such as the *British Columbia Fishery (General) Regulations*, authorize the provincial Minister to have total authority and responsibility over all areas described in Regulation, s. 58 and to authorize the provincial Minister to, himself pass such Regulations as he may decide upon .

The County Court, thus, found that the Fisheries Act contained no specific authority to delegate and contained "no suggestion that the whole subject of inland fisheries may be subdelegated to a Province with power and authority to legislate or regulate" (R. v. Tenale 1982:188).

The result of this argument is that if a Province does not have proper constitutional authority to legislate in regards to a specific subject matter, either from section 92 of the Constitution Act, 1867, or from a lawful delegation from the federal government, any legislation purported to deal with the subject matter is *ultra vires* and thus void. It therefore follows that convictions cannot be obtained on charges under such legislation, since the legislation has no force or effect.

The second argument on this issue is in regards to the requirement, under the Statutory Instruments Act, to publish

regulations in the Canada Gazette. That Act states that no person shall be convicted of the contravention of any regulation that was not published in both official languages in the Canada Gazette. This was an absolute bar to sustaining a conviction when the publication requirements were not met.

The hunting issue cannot be considered by a simple reference to statutory requirements. The right of Indians to hunt arises from many sources. Treaty Indians, being descendants of treaty signers and thus entitled to the inheritable and assignable rights and obligations thereunder, have contractually guaranteed rights to hunt. This first source of hunting rights does not apply to most areas of British Columbia, and in particular does not apply to the Indians in the cases considered in this chapter, since treaties were not signed in most areas of the province

The second source of hunting rights are statutory guarantees (Brown 1981). The first was the Royal Proclamation of 1763. It reserved to the Indians as their hunting grounds all lands not ceded to or purchased by the Crown. Although this reserved hunting rights, most statutory enactments have restricted Indian hunting rights such as the Natural Resources Acts on the prairies, the Migratory Birds Act, The Fisheries Act and section 88 of the Indian Act. These acts have restricted hunting in certain places, at certain times of the year for specific species of birds and fish, and imposed provincial hunting laws on Indians hunting

off reserves.

The most restrictive law has been the Indian Act. Section 88 states that:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province . . .

This has been discussed in many cases involving Indians hunting off the reserve. The most important issue in the section is what does "laws of general application" mean? This was discussed by the Supreme Court of Canada in Kruger and Manuel v. The Queen. This case decided that a law of general application was (Brown 1981: 126):

> characterized by two *indicia* . . . . First, the law must extend uniformly throughout the province. Second, and more crucial, "the intention and effects of the enactment need to be considered." In applying this second test, a law should be held as intending to apply generally so long as it was not in relation to one class of citizen . . . provincial game laws were not laws that applied to Indians *qua* Indians.

This second test means that a provincial law may not affect Indians in any manner related to their "Indianess", or in other words, to their way of life that is different from non-Indians. Since only the federal Parliament has the power to legislate in regards to Indians the provinces may not. A

long line of cases from Kruger and Manuel have addressed this point. The cultural features of a person's life that makes him an Indian must not be interfered with by provincial laws. Provincial hunting laws have generally been found to restrict hunting (i.e. apply to conservation of wildlife) and not restrict cultural practices and thus apply to Indians. The statutory recognition of Indian hunting rights have tended to be more restrictions than guarantees.

The third source of hunting rights arises from aboriginal title over land. This has also been a source of confusion since often courts will not address this issue if it is not central to the case at bar (Brown 1981).

Use of Indian Witnesses

This case used thirteen Indian witnesses and two other experts. The first was Crawford Young, the Chief of field services for the Federal Fisheries Department. His evidence was about the method of passing provincial regulations through the federal department, and that the provinces were given the authority to pass their own regulations to speed the process. The other expert was a wildlife biologist who gave evidence on the gathering of statistice concerning wildlife and the setting of hunting limits.

The first Indian witness was Arthur Andrew Dick, one of the accused. He was 27 years old, single and a member of the Alkali Lake Reserve of Shuswap Indians. He had grade 12 education but had learned much from his father and

grandfather, including how to hunt and fish. He described these activities as follows (Tenale Transcript 1981: 253):

> Q. . . . What is the primary purpose of hunting and fishing as carried on by yourself and the people of your village?
>
> A. It's our way of living, our way of surviving, our way of living the lives we know or know best. Just to survive off the land, which we believe was there for our purpose.

He gave evidence that the meat obtained by hunting was shared by the others in the village.

The next witness was Ricky Dick, another of the accused, also a member of the Alkali Lake Reserve. Ricky was an 18 year old grade ten student. He told the court that he helped his father with his trap line on weekends and had learned how to hunt and fish from his father and some elders on the reserve. His brief evidence described hunting as a part of his way of life.

Willard Dick, a 49 year old trapper, and the father of the accused Arthur, was the next witness. He gave evidence that he had learned to hunt from his father and had, in turn, taught this to his sons. He emphasised that nothing of the animals killed was wasted, since hunting was an integral part of their way of life, as was sharing the meat obtained. This witness also described his knowledge of the spawning of the fish in the creek in May which made them easy to catch in this the Indian fishing season.

Rose Dick, Arthur's 47 year old mother followed. She explained that she had learned how to dry and smoke meat from her grandparents. She also told the court that most of the meat in her home was obtained by hunting and fishing. When asked if she would trade her way of life for any other, she emphatically replied "no, no way." On cross-examination, she explained that smoked meat could keep all winter.

The fifth witness was not an Indian, but was the Director of the Provincial Fish and Wildlife Branch, Don Robinson. He described the policy for issuing sustinance permits, to needy people in times of stress. He advised the policy did not include the issuance of these permits to Indians for a continuous supply of food.

The fifth Indian witness was Tommy Billy, a 68 year old Indian from Canoe Creek. His brief evidence was that he had never attended school and he worked as a cowboy for most of his life, during which time he also hunted for food. He said food was shared in Indian camps.

Augastine Tenale, one of the accused, a 46 year old Shuswap Indian from Canoe Creek followed. His brief evidence was that he had a grade five education and worked at fencing and ranching. He was married with three children and hunted when his family needed food. He also told the court that he knew the fish spawned in May in the creek which was the subject matter of the case.

This was followed by the very brief evidence of 60 year old Laura Harry of Alkali Lake Reserve. She said her

grandparents had taught her that people must look after each other and that now she was glad that people still shared meat and that she obtained her meat in this way.

The eighth Indian witness was Shirley Robins from Alkali Lake Reserve. She had completed a two year course in the Native Indian Teacher Education Program and one year of linguistics at the University of Victoria, and was currently working doing cultural research part time for the school district. She had written children's stories in Shuswap for distribution to schools about things in life on the reserve. She said she thought it was important to write down their cultural history to pass on to the children in school. She conducted an oral survey, for the trial, of the 42 hunters on the reserve as to how much meat they took in 1980. She found that they had taken 117 deer, 48 moose and 915 fish.

Patrick Johnson, one of the accused, thirty-nine, of Canoe Creek gave evidence next. He had learned hunting and fishing and gardening from his parents. He worked as a laberour at various jobs, and since he quit drinking, had travelled to various Indian groups to talk about Indian values and way of life. In describing how he felt about the Indians' relationship to the land he said (Tenale Transcripts 1981: 398-399):

> We live with everything on [the land], we live in harmony with it. It provides us with our food, such as deer and moose, and fish, It also provides us with our shelter. We've also said, our ancestors, my

> grandfathers, have not written any laws about our hunting and fishing, so the white men write their reserve school.

He stated that he wanted to work on the reserve to help his people and was planning to have cultural items in the curriculum. He advised that he eats wild food.

The next witness was John Johnson, 42, of the Alkali Lake Reserve. He told the court that he taught his own children the Shuswap language so that it would not be lost. He said he hunted for food and shares his meat with his parents and grandparents. He told the court that he had had a drinking problem and overcame it at a clinic in Alberta and now lives his life by traditional Indian values. He stated that he "lives for today" not the past or future. He hunts meat as he needs it day by day regardless of the hunting seaso n.

The final Indian witness was Andy Chelsea the 38 year old chief of the Alkali Lake Reserve. He had a grade seven education and was married and had five children. He showed a map which outlined the hunting areas used by band members since 1928 and demonstrated where areas had been logged out near the reserve. He told the court that the band had been taking control of many of their own programs such as education and housing to increase skilled employment of band members and reduce the drinking problem. He told the court he hunts to get meat when he wants meat, regardless of the hunting season. He stated he did not think sustenance

permits applied to Indians. He said he obeyed laws like those for driving, but not hunting laws because hunting was his way of life.

Use of Anthropologist as Expert Witness

The anthropologist called was Dr. Michael Asch, Associate Professor in the Department of Anthropology, University of Alberta. He was called as the last defence witness after he had heard all the evidence given during the course of the trial.

He was qualified in a thorough manner. His curriculum vitae was entered and, he was questioned by both counsel on its contents. The Crown noted that Dr.Asch had had a change in his major area of interest, but did not dispute his qualification because of his consistant work in the area of foraging people and their economies over the last number of years. The trial judge qualified him as follows (Tenale Transcripts 1981: 455):

> Dr. Asch, for the purpose of this hearing, I'm going to qualify you, firstly as an anthropologist, secondly as an expert on the theory of culture change, thirdly, on the adaption of foraging people to the industrial society, and fourthly, on the post contact history of Europeans to the Native North American people, as requested by counsel. It will be a ruling accordingly.

The examination in chief was lengthy and presented an overview of anthropological theory and direct evidence gathered from Dr. Asch's personal fieldwork and from reading. Dr. Asch defined for the court many terms including: foraging, anthropology, culture, institution, traditions, values, transmission by learning, way of life, the relationship between cultural events and culture, social change, reciprocity economies, Indian and Shuswap. He discussed issues such as the fact that there is disagreement among anthropologists on the theory of culture change, the development of new ideas about hunting economies, and hunting as an institution in Indian culture.

Dr. Asch acknowledged that he had not studied the Shuswap people. He did, however, visit the reserve where the accused lived for two days before the trial to gather information on their hunting practices. When asked, he replied that he was able to apply the anthropological concepts he had described, on the basis of what he heard in Court and the information obtained from his visit. He then described the sharing of hunted food by the people as a form of reciprocity economy common to foraging peoples. This, he stated, was important in the socialization process of the people, and thus an important part of the continuation of their culture.

The expert witness interpreted the evidence given in regards to hunting and fishing practices. He stated that the two main features of huntng were its seasonality and the

fact that it satisfied a need for food. Their cultural practice was to hunt or fish during the proper season, and only to satisfy community needs for food. This was an opinion based on the evidence before the court and from his own observations.

An interesting and effective method was used to substantiate the anthropological evidence. Two documents, unrelated to the facts of the case, were entered as exhibits, and then referred to by the witness as comparative and supportive material. Volume 1 of the Report of the Mackenzie Valley Pipeline Inquiry was used to demonstrate that other tribunals were concerned about a native group with a lifestyle and economy similar to the accused. This document acknowledged that the Dene had a reciprocity economy based on hunting, and recommended that there be a period of adjustment before economic and technological changes were introduced to the area. Excerpts from the Report of the Select Committee on Aborigines, 1837, were also introduced. These were used to show that the British government recognized hunting and fishing as an important aspect of the way of life of the Indians from early times.

The Crown cross examined the witness and appeared to attempt to obtain a statement from him that would show a subordinate cultural group may have a tendency to disobey the laws of a dominant group or revolt in some fashion. This was not successful. Both the Crown and the Court separately questioned the concept of conservation. The witness clarified

this point and explained that the Indians and the rest of society while each interested in conservation, by having a different emphasis on what to conserve they each had a different method whereby conservation, in their own terms, could be accomplished. The Indians concept of conservation was based primarly on two features: the question of seasonality, and the needs of the community, not personal, larder.

The evidence of the expert generally followed a pattern of explaining and defining anthropological concepts for the Court's understanding, then applying those concepts in an explanation of the evidence given by the Indian witnesses, and adding empirical data collected by himself. This was all substantiated by documents entered as exhibits.

Judicial Comments on the Use of Expert Evidence

The County Court heard the Dick and Tenale cases together. Judge Andrews noted (R. v. Tenale 1982:182-183):

> A considerable volume of evidence was called at trial as to Indian culture, habits, history, the significance of hunting and fishing as part of that culture, and specifically as to provincial conservation objectives and methods, sustenance permits, food requirements, traditional claims and so on. This testimony was supported by various maps as to alleged historic hunting areas, policy statements and lengthy opinion evidence of a Dr. M.

Asch, an anthropologist who is the author of numerous papers dealing with *inter alia*, aboriginal rights.

The trial Judge dealt only briefly with the evidence in his reasons for judgment. He stated however that the conclusions he reached are "based upon my interpretation of the evidence and the inferences to be drawn therefrom, *not* on any finding of credibility of the various witnesses".

After dealing with the legal issues concerning the fishing regulations, and in the consideration of the hunting charge, the court held (R. v. Tenale 1982: 191):

> I have reviewed this material and the substantial testimony of trial witnesses. It is apparent therefrom that hunting and fishing forms a significant part of the Indian culture. I do not conclude however, that the trial Judge was in error. I do not find in all of that evidence anything from which I might have reasonably concluded that the policy of the *Wildlife Act* was such as to impair, at least in any substantial way, the status and capacity of the appellants. I do not find in all that evidence anything from which I can reasonably conclude that status and capacity of the appellant was impaired to any greater degree than those Indians involved in the *Kruger and Manuel* and *Haines* cases.

This court was required to follow and apply these Supreme Court of Canada decisions. Since Indians could hunt on reserves at all times, and off reserves during hunting season or with a permit, the provincial law did not destroy or impair their way of life as Indians.

The Court noted that the anthropological evidence was "prepared, presented and vigorously argued" but (R. v. Tenale 1982: 192): "The extent of the evidence however does not, in my view, raise a new or novel position. What it does demonstrate is that provincial game laws in general have a "greater consequence" to the appellant than to others. But this is not sufficient." The judge noted that while he was enlightened as to the way of life of Indians, this information was not within the degree of evidence required to provide a defence in law. Only a law that totally prohibited an aspect of life that defined the people as Indians would be held to not apply to them. The County Court thus, found the evidence revealing as to the life ways of the accused but not relevant as a legal defence to the charge.

The Court of Appeal when considering the appeal on the fishing charges did not make reference to the evidence. The two justices who presented the majority judgment, MacDonald, J.A. and Seaton, J.A., made brief references to the evidence given and stated that the question of the appeal was on findings of fact and not law and thus could reference to the anthropological evidence. He stated (R. v. Dick 1982: 183):

> Nine members of the Alkali Lake Band and three members of the Canoe Creek Band gave evidence. They described their lives and the significance of the rituals of food gathering. They told of their dependence on moose and deer for food and for traditional and valued items of daily clothing and ceremonial clothing. Their evidence was placed in its cultural framework by Dr. Michael Asch, an anthropologist.

He went on to list some of the statistics prepared and presented by the anthropologist as well as a description of hunting and food sharing. He noted that (R. v. Dick 1982: 183): "Dr. Asch drew the relationship between the testimony of the Indian witnesses and the institutions and practices of the traditional way of life of the Alkali Lake Band of Shuswap People".

The dissenting judgment does point out that the role of the anthropologist in this case was twofold. First, he presented important statistical evidence that contributed to an understanding of the hunting practice of the people. Second, he tied together all the evidence into a theoretical framework so that it could be more easily understood by and relevant to the court.

Although it was not specifically mentioned, the anthropological evidence appears to have had some impact on the issue of sentencing, since light fines were imposed.

Disposition by the Courts

The two charges, hunting and fishing violations, were heard together as one trial from January 26 to 29, 1981, in the Provincial Court of British Columbia, at 100 Mile House, before His Honour Judge G.H. Gilmour. After hearing the lengthy defence evidence, the Court found the accused guilty of one charge each. Dick was fined fifty dollars for killing the deer, and all five men were fined one hundred dollars each for fishing out of season.

All parties appealed the convictions to the British Columbia County Court. Judgment was given by His Honour Judge Andrews, on February 2, 1982. He held that the British Columbia Fisheries Regulation, BC 86/80, was *ultra vires* the province, and allowed the appeal of all parties to that conviction. In regards to the hunting conviction, he held that the Wildlife Act was a law of general application, and it did not impair the appellants status and capacity as an Indian, and thus upheld the conviction.

Dick appealled the conviction to the British Columbia Court of Appeal; at the same time, the Crown appealled the acquittals under the fishing regulation. Judgment was given on December 21, 1982. In regards to Dick the Court of Appeal split two to one, and upheld the conviction. Mr. Justice Seaton held that the appeal was based on questions of fact, dealt with by the County Court, and could only be based on questions of law alone. He also held that the Kruger and Haines cases had dealt with the issue and were not

distinguishable from the case at bar. For these reasons he dismissed the appeal. Mr. Justice Macdonald, also held that the first two courts dealt with the issues of fact, and dismissed the appeal because it did not involve a question of law alone.

Mr Justice Lambert, in a discenting judgment, allowed the appeal. He felt that the evidence given as to the way of life of the accused made the case distinguishable from Kruger, in which there was "an absence of clear evidence" that the Wildlife Act affected the Indian way of life. This opinion was qualified by Lambert J. as follows (R. v. Dick 1982:15):

> I have concluded that the provisions of the Wildlife Act, to the extent and only to the extent that they prohibit or interfere with the activity of the Alkali Lake Band in foraging for food and skins by killing moose and deer for the use of Band members, do not apply to the Alkali Lake Band or to Arthur Dick as a member of that Band.

This decision, being a minority one, does not apply as law. The Supreme Court of Canada agreed with the majority decision.

In regards to the Crown's appeal of the acquittals on the fishing charges, judgment was given by Mr. Justice Seaton, and agreed to by Mr. Justice Macdonald. The appeal was dismissed, and the court held that the federal Fisheries Act did not give the Governor in Council the power to

delegate to another government the power to enact regulations controlling fishing in the province. A second reason for the acquital was that the federal Statutory Instruments Act, section 11(2), stated that "no person shall be convicted of an offence consisting of a contravention of any regulation that at the time of the alleged contravention was not published in the Canada Gazette". The British Columbia regulations were not so published.

C. The "Jack and Charlie" Case

The Facts

The two accused, Anderson Jack and George Louie Charlie, were both members of the Tsartlip Band, at Saanich, British Columbia. They shot a deer for Elizabeth Jack, who was the wife of Jack and the sister of Charlie. She requested that they kill a deer for her so that she could burn raw deer meat in a ceremony to give food to her deceased ancestors.

The deer was shot, on May 26, 1978, on Pender Island, at a place that was not within an Indian reserve, during the closed season. The Royal Canadian Mounted Police, acting on information given by an informant, searched the accused's car and finding the gutted deer, charged them with hunting a deer at a time not within the open season contrary to section 4(1)(c) of the Wildlife Act 1966.

The Legal Issues

The legal issues in this case were the same as the hunting issue in the Tenale and Dick case discussed above. The defence offered, however, was different, and somewhat unique. Mr. Justice Taggart, of the British Columbia Court of Appeal, stated the legal issues raised by the defence as (R. v. Jack 1982:197):

> The appellants made substantially the same submissions to us as those made to the appeal court judge. While their arguments were separated into three divisions, as I view the arguments they are twofold.
>
> The first is that in Canada there is a right to freedom of religion. Legislation which impairs that right, even though it may be given full effect for other purposes, cannot be so applied as to deny the right to practice religious beliefs.
>
> The second argument is that the Act, by interfering with the freedom of the Coast Salish people to practice their religious beliefs, affects their capacity as Indians. Because it affects them as Indians, the Act can have no application to the [accused] in the circumstances of the present case.

The defence, thus, was based on a "freedom of religion" argument, that the Wildlife Act, restricted the ability of Indians to engage in their religious practices of burning deer meat for their deceased ancestors.

Use of Indian Witnesses

In the Jack case nine Indian witnesses were called, including the two accused. The counsel conducting the case stated, in her opening remarks, that the purpose of calling these witnesses was to show that the practice of burning deer meat had a deep religious meaning to the Indian people and the accused hunters, and the "beliefs which support the practice go right to the root of these people calling themselves Indians" (Jack Transcripts 1979: 44).

The first witness was David Elliott, a sixty-nine year old retired fisherman and custodian, of the Salish tribe who lived on the Tsartlip reserve. He was called to explain some of the history of his people and the meaning of hunting as background information for some of the other witnesses.

He described himself as an elder of his reserve. He said (Jack Transcripts 1979: 54): "I'm an old person, a senior person, a person that our people always look up to and honour, old people because they have much experience and much knowledge of their history, their past, their culture and so on." He gave a brief history of the territory of the Saanich people, and described the Saanich inlet as their traditional home base, and that their summer hunting area extended much beyond that, and included Pender Island. Traditional work included hunting, fishing, boatbuilding, sailing, and housebuilding.

Pender Island was used for hunting seals, porpoises and deer; for fishing; for gathering materials needed for

baskets and housebuilding; and for food gathering. Hunting was learned from the older people who lived in large multi-family houses, although today individual families live separately and pass on traditional skills to the young. He related that hunting was a part of their way of life.

George Manuel, the second witness, was a fifty-eight year old, Interior Salish Indian from Mission, British Columbia. He was the President of the Union of British Columbia Indian Chiefs, and the President of the World Council of Indigenous People.[13] Mr. Manuel gave evidence on the religious aspect of Indian life. He stated that Indians throughout Canada had the same religion, but that the ritual or style varied. He gave evidence on the traditional methods of becoming a religious leader, which usually involved a person spending an extended period of time alone in the bush until the person received a song from an animal that chose to help him.

He described from his personal experience how government policy and the Christian church, through the residential schools and other means, attempted to suppress the practice of Indian religion for most of this century. The Indian religious beliefs were maintained, he contended, and this was especially the case on the British Columbia coast. His testimony best describes his reasons for this

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[13]This is an organization of 23 countries from South and Central America, the Pacific and Scandinavia, which had its founding meeting in Vancouver, B.C., in 1979, which was organized by George Manuel when he was the President of the National Indian Brotherhood.

(Jack Transcripts 1979: 73):

> Well, I think that everything I say is theories, I mean I'm not basing this in fact. I think for one thing the Indians here were more mobile in terms of canoes and they could move around a lot and they can move from one area to another and so in that respect I think they were able to retain their religion by going underground when the law'[4] came into force by moving one step ahead of the law all the time. I think the other is there was pleanty of food here, in the interior there weren't. Indians had to concentrate in certain areas and they were at the mercy of Christianity and the law enforcers. I think the third thing is, Vancouver Island...'[5]Southern Vanouver Island was where all the commonwealth military officers came to retire in the early years and they had a very high class livelihood, when you compare it to Indian people, and I think that also they had experience in other commonwealth countries, the same experience that they had so they didn't take the Indian religious activities here serious because they'd seen it in Africa and Asia and so

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[4]This reference is to the anti-potlatch law first enacted in 1884.

[5]The transcripts contain in many places a notation ... apparently indicating either a pause in the testimony, a change of thought, or a word or words that were not heard or understood by the court reporter. These are included in quotations in this chapter as ... without spacing. Where I have left out part of a quote it will be indicated in the usual manner of . . . with spacing

didn't have the same kind of concern for it and didn't take any serious actions against it.

The third Indian witness was Tom Sampson, a forty-three year old employee of the Federal Fisheries Department, and a member and resident of the Tsartlip reserve. Mr. Sampson was the Chief Councillor of the band. He described the practice of burning as follows (Jack Transcripts 1979: 77):

> Q. I am going to ask you to, at this time, describe to the court what a burning is.
>
> A. Well, the burning, I suppose of...is in relation to our religious practices and usually it's done by very few people who are selected through training out of...over years of training I guess. And the purpose of the burning is to assist the families in bringing about some peace of mind of their own. The burning, I suppose, is done by one of the elders who is here today, is to help the family, to help the family find peace of mind in remembering or trying to put their mind at ease with those who have passed on. It's usually a close relative or even a friend, distant friends that it's done for. And the purpose of this is again to give medicine to the person or to the families involved. The purpose of it, I guess, the main purpose I guess, is to assist the family, it's to help us, make us feel better, it's to either remember our loved one or to try to put him away forever in our minds.

He related that the custom was probably hundreds of years old, since his great grandmother, who raised him, knew of the practice, and she died at the age of 109 years. His own family had had a burning twice, and at one of those one of the accused, Anderson Jack, his wife Elizabeth and her father Louie Charlie, had assisted.

A burning, he stated, must be prepared for immediately upon the thought of a deceased person entering the mind of a Salish Indian. A person who knows how to conduct one is contacted to tell what arrangements must be made, and what food must be gathered. In regards to the food he was asked (Jack Transcripts 1979):

> Q. And I'm wondering whether or not the burning of deer meat, in your mind, is essential to the conducting of a burning?
>
> A. Yes, it is. We believe, because of our teaching and our up bringing, that those type of foods that we eat, it's necessary to burn that kind of food. In other words if deer is the means for us to communicate or to make ourselves better with those who've passed on then that's the type of thing we have to do. We don't really have a choice, you can't substitute it for something else, because if you substitute it for something else you're not carrying out your practice of your religious beliefs according to, you know, how we have conducted, you know, the spirit world. And usually after discussion

> with Louie Charlie, who does most of the work for us, he will tell us, you know, what's probably the best.

He described how they believe that death only transforms a person to another world. People do not die, they just leave here for awhile; they cannot be seen but are always present. The survival of the people, he said, depends on being able to nourish their spiritual and religious beliefs by practicing the burning of food, and thereby feeding their ancestors.

On cross examination he was asked if there was a choice of traditional foods that could be burnt, or if one, and nothing else, could be burnt. He answered that a choice could be made from among the variety of foods eaten by the deceased in their lifetime. The Court asked why, if it was necessary to the religion, his family had burnt only twice. He replied that a burning is conducted only when it comes to the mind of someone, and they are not done on a regular schedule. Some families burn more often than others.

The fourth witness, Samuel Sam, gave brief evidence that confirmed what was said by the previous witness. Mr. Sam was a fifty-three year old coordinator of the drug and alcohol program for the Saanich Peninsula four reserves, and a member of the Tsartlip band. He had a burning on three occasions within the previous ten years, and at one the main participants in the events leading to the trial, assisted. When asked what significance burning had for himself, he

answered (Jack Transcripts 1979: --): "Well, I mean, there's a lot of satisfaction, I guess, spiritually, emotionally, of being close to that spiritual world of the spirits of your elders that have gone." He summarized his evidence by saying that burning is an important way for Indians to deal with emotional upset, since they mostly feel that non-Indian psychiartists cannot help.

Elizabeth Jack, wife of one of the accused and sister of the other, was called as the fifth witness. She gave the details of the events that led up to the charges of the case being laid.

Her father, Louie Charlie, was one of the main religious leaders of the band who conducted burnings. He taught her and her brother, George Charlie, how to assist in burnings, since they were children. In December, 1977 she held a burning for her ancestors, and burnt potatoes, hamburger, Indian bread and clams, because that is what she said they all ate. Her father told her that she had to burn raw deer meat, for her great grandfather, and because she had none, she was bothered and felt she needed to conduct a second burning. She asked two men to get her a deer, but they did not. She finally asked her husband and brother, and they went together to Pender Island and shot the deer in May, 1978. After the deer was seized by the police, she had her burning and burnt clams, Indian bread and some pop.

Her father, eighty-one year old, Louie Charlie, was called next. He gave a brief, and undetailed description of

burnings and added little to what was already given in evidence.

Anderson Jack, one of the accused, was the next Indian witness, and he followed the anthropological expert witness whose evidence will be discussed later. He was a fifty-five year old member of the Kuper Band of British Columbia. He gave evidence that described the killing of the deer, and stated (Jack Transcripts 1979: 136):

> All I thought, 'We're Indians, we're in the Indian reserve', like what Dave Elliott said, that island belongs to the Indians, it's where they get their foods, gather their food in the summertime, they dry it up, the fish the clams, the deer meat, they even dry the deer meat ready for the winter.

He confirmed earlier evidence that he regularly participated in burnings by assisting with the preparation of wood and building the fire.

The eighth Indian witness was George Charlie, the other accused, a fifty-one year old member of the Tsartlip reserve. He also described the events leading to the killing of the deer and said (Jack Transcripts 1979: 141):

> Well, according to my belief I know that that what we wanted...what my sister wanted, meat that...for the burning, and it's not for me. not for my father, it's not for the family but it's for the people that are gone, and that was the reason why I shot that deer.

He also confirmed that he regularly assisted his father with burnings by doing whatever there was to be done.

The final witness for the defence was forty-five year old Phipip Paul, a member and resident of the Tsartlip reserve, and Vice-president of the Union of British Columbia Indian Chiefs, responsible for the development of educational policy for Indian people of British Columbia. He described that education and Christian churches have failed to meet the spiritual needs of Indians, which has resulted in high numbers of criminal convictions, alcohol abuse and high suicide rate among the people. He stated that there is a rebirth of spiritual approach to Indian culture across Canada.

He had Louie Charlie do two burnings for his deceased father. He summed up his beliefs as follows (Jack Transcripts 1979: 149):

> Well, I think that the Indian spiritual approaches are so intertwined with the culture of Indian people and so much a part of the lifestyle, you know, without the spiritual approaches there'd be relatively nothing on which to build the culture. And I think that the spiritual churches fell because most of their...most of our understanding at least of being inbvolved with the Christian churches, they are very much cought up in dogma and hierarchy and structure and things that Indian people cannot relate to, and from my living and understanding of

> my own people their whole...the main part of their culture is a spiritual part and it's related to nature and without this spiritual essence the culture would be nothing and it's so much an essence of the cultural life style of Indian people that if we weren't allowed to practice these approaches then the culture wouldn's survive.

Use of Anthropological Expert Witness

The anthropologist called was Dr. Barbara Lane from Victoria, British Columbia. Her curriculum vitae was entered as an exhibit and a voir dire held to determine the issue of her qualifications. She stated that she had a Ph. D. and wrote her dissertation on the religious systems of the northwest coast Indians. She had thirty years experience in studying the Coast Salish, and during that time had attended many private and public religious cerimonies. She had appeared in previous cases as an expert witness in Alaska and British Columbia. Her qualifications were uncontested by either the Crown or the Court.

Although the Court stated that she was qualified to express opinions and give opinion evidence, almost all of the evidence she gave was direct and not opinion. She described that burnings are documented in the anthropological literature, and gave a brief description of the practice. She indicated that the practice was eltremely old and stated (Transcripts 1979: 129):

> Well, all the evidence would suggest that it's been going on as long as these people have been in this area, which is somewhere upwards to twenty thousand years. We have no reason to assume that the antiquity of these religious practices and beliefs is any less old than Judaeo-Christian tradition, probably older.

She described the Indian view of the world and the place that deceased people had in it, and talked about the job of religious specialists. When asked her opinion as to what were the "indicia of religiousness" in the practice of burning, she replied in reference to the testimony of the previous Indian witnesses and repeated what they had said.

The only real opinion made in relation to the issue before the court was (Jack Transcripts 1979: 134):

> Q. In your opinion is the Indian religious praactice of burning a vital part of the Indian religion today?
>
> A. I would say it's [the] essential part.

There was no cross examination.

Judicial Comments on the Use of Expert Evidence

The trial judge in the Jack case at first was uncertain of the value of the evidence proposed. He stated (R. v. Jack 1979: 338):

> At the outset I quieried the relevance of the evidence which defence counsel proposed to call,

> however, counsel for the Crown did not raise any objection and in fact appeared to consider it was relevant and admissible and was co-operative and sympathetic with the accused throughout.

The court noted that the evidence given was interesting and revealed the religious practices and beliefs of the Coast Salish.

The court noted that the evidence of the Indian witnesses was put forward sincerely. He listed the witnesses by name and gave the main essence of each contribution. The evidence of these witnesses and the anthropologist was accepted by the court and summed up as follows (R. v. Jack 1979: 340-341):

> The members of the Saanich people who testified all spoke of the religious ceremony of burning food to satisfy the spirits of their ancestors, and their elder, Louie Charlie, said that the ceremony of burning food required the kind of food which was eaten by the ancestor and that no other would do to satisfy the ancestor's spirit. Doctor Lane, the anthropologist, said that the burning of food for the dead is a kind of memorial and is a very ancient traditional ceremony. She said the Coast Salish have lived here about 20,000 years and that all of the evidence indicates that these practices have prevailed as long as those people have lived there. She says that the ceremony of burning food is

> referred to in the earliest records written about the Coast Salish people of whom the Saanich are a part. They believe that all the animals and birds and people who have lived here continue to live here after they die, although they cannot be seen, their spirits are all around us. They do not understand how other people can leave their ancestors in other parts of the world. She said much local religion is concerned with maintaining the well-being of humans and animals. One of their religious specialists, like Louie Charlie, helps them to communicate with the spirits of dead relatives and is hired to do so and he burns food for the dead. Food so burned is meant to be eaten by the dead and they obtain sustenance through the smoke. This, she said, is an essential part of the religious practices of the Coast Salish peoples. Many other Indian tribes believe the spirits of the dead are always with them. I am satisfied, therefore, that the practice of burning food in a ceremony for the dead among the Saanich people has been established by the evidence and that these practices have been passed down from generation to generation through the elders.

The court thus accepted as fact the evidence concerning the burning ceremony given by the Indian witnesses and the anthropologist. This fact, although it gave the court a greater understanding of the accused and their religious

practices, did not relate directly to the case as a legal defence to the act of hunting, and the case was lost by them for reasons given below.

The County Court did not refer to the anthropological evidence except indirectly in a reference to the "sincerely held religious belief" which the court held to be properly the subject of legal sanction.

Two of the three Appellate Justices referred to the anthropological evidence, and the third noted as fact one statement made by the anthropologist. Mr. Justice Taggart set out the evidence at length and noted how Dr. Lane explained the beliefs behind the burnings, the practices involved in burnings, he noted that she listed anthropological literature and that her evidence was confirmed by the Indian witnesses. Mr. Justice Craig also referred to Dr. Lane's testimony as confirming the Indian witnesses's statements. Although this evidence was noted as a finding of fact at trial, the appeal was lost by the accused on other grounds noted below.

All of the Courts appear to have accepted the evidence of the Indian witnesses and the anthropologists as valuable information which led to a finding of fact and a greater understanding of the actions of the accused. The statements were not challenged by the Crown or the Court, and were accepted as admissible evidence. The relevance of the evidence was the problem. The courts all considered that the evidence was of a practice associated with a religious

practice and not a religious belief, and thus not a defence to the charges.

Disposition by the Courts

The trial of the issue was conducted on May 31 and June 1, 1979, before His Honour Judge Allan, of the British Columbia Provincial Court. Judgment was given on June 28, 1979. After distinguishing a series of cases on religious freedom, the court held (R. v. Jack 1979:344-345):

> In Kruger . . . the Supreme Court of Canada considered the very statute which is said to have been breached here, and decided unanimously that it was a statute of general application and a valid enactment, having as its object the conservation and management of provincial wildlife resources and that the accused, who were Indians, were subject to its provisions so long as the Act, in its policy, did not seek to impair the status and capacities of the accused *as Indians*. It is here contended that the effect of the provision which is sought by the Crown to be enforced is to impair the status of the accused *as Indians* by preventing them from exercising their *bona fide* religious practices. I am unable to accept that contention. To do so may well prevent the effective management and conservation of provincial wildlife resources. If Indians wish to exercise their historic religious practices there

are ways within the bounds of the provincial statute in which to exercise those religious practices. They can, for example retain a supply of deer meat in storage for such purposes. Section 9 [rep. & sub. 1971, c. 69, s. 9] of the *Wildlife Act* makes provision for that. The purpose of the Act is what matters. This Act has been held to be and is, clearly, I think, of general application and was certainly not aimed at preventing the Coast Salish from exercising any religious practice, and the act of burning food as an offering to the spirit of an ancestor is not prohibited. If it is excercised within the limits of the general law it may be freely carried out by the Saanich people, and although there is no question as to the intent of the accused . . . it is thus immaterial that this offence appears to be one of absolute liability, all persons in the Province are bound by the provisions of the *Wildlife Act*, save those who come within the exception, by obtaining a permit, which is not relevant here. In strict logic even persons who have committed this offence while legally insane ought to be found guilty of it if fit to stand trial at the time of trial. And the fact that the deer was killed to obtain deer meat for use in a religious ceremony, as here, is no defence. In other words, once the *actus reus* is proven a finding of guilt must follow.

The provincial law applied to hunting. The defence raised was in regards to a religious practice or ceremony. If the act committed had been part of a religious belief and was prevented by the provincial law it would have been a good defence. For example, if Indians believed that animals must only be killed at night with the aid of a light or some spiritual harm would befall the hunter, provincial laws against night hunting would affect their Indianess. This was not the case here, however.

An appeal was made to the County Court, and His Honour Judge Tyrwhitt-Drake dismissed the appeal on February 14, 1980. In regards to the effect of the Wildlife Act on religious freedom the Court found that there is a difference between "freedom of religion", which is really "liberty of conscience", and the practices which flow from a religious belief. He distinguished cases presented in argument on the grounds that they dealt with the impact of legislation on liberty of conscience, while the case at bar concerned a conflict between a statutory prohibition and an act of religious practice, when such acts are properly subject to sanctions imposed by law. In regards to the issue of the effect of the Wildlife Act on the status of the accused as Indians, the Court followed Kruger and stated (R. v. Jack 1980:5): "There was no evidence before the learned Judge from which it could be inferred that the Wildlife Act was directed against native persons in any unfair or discriminatory way."

This decision was again appealled, this time to the British Columbia Court of Appeal. On June 15, 1982 the Court gave a two to one decision, again rejecting the appellants' contention. Mr. Justice Taggart held that the Wildlife Act did not have as one of its purposed the regulation or restricting of freedom of religion, it was to regulate hunting to protect wildlife. For this reason the first argument failed. In regards to the question of the affect of the legislation on their capacity as Indians, Taggart, J.A., applying Kruger, said (R. v. Jack 1982:202):

> . . . in order to succeed on this second argument, the appellants must show that the policy of the Act is to impair the capacity of Indians to practise their religion. It is conceded that the Act does not affect the status of Indians. In my opinion there is no evidence before us of a legislative policy to impair the capacity of Indians in the manner contended for by the appellants.

and thus the second argument also failed.

Mr. Justice Craig agreed that the appeal should be dismissed. He held that the County Court found that the premise of religious freedom related not only to thought and belief, but also to practice; but that practice might be subject to legal sanction if it was an illegal act. In regards to the question of legislative impairment of status an an Indian, Craig, J.A. held that Kruger determined that the Wildlife Act applied to Indians. The argument of the

appellant that it impaired their status depended on evidence and thus was not a question of law alone, and could not be considered by an appellate court.

Mr. Justice Hutcheon, in a discenting opinion, would have allowed the appeal, and stated (R. v. Jack 1982: 210): "In my opinion the Wildlife Act ought to be read so as to acknowledge the right of Jack and Charlie on these facts to practice their religion where no competing interest of society exists."

D. Comparison of the Use of the Experts

These two cases demonstrate different uses of anthropological expert witnesses. The differences arose both from the manner in which the lawyers presented the order of their witnesses and the detail in which they examined them and the way in which the anthropologists prepared themselves.

In the Tenale case the lawyer caled all Indian witnesses first and introduced his expert at the end. The questioning of the anthropologist was detailed, but allowed him to expand on his evidence and present it in his own order. The court and Crown counsel both questioned the expert. In the Jack case, on the other hand, the defence lawyer presented her expert in the middle of all witnesses. The examination was brief and not detailed.

The anthropologist in Tenale was very well prepared. He had spent time, even though it was very short, immediately

before the trial with the Indians on the reserve from which the accused came. He gave detailed definitions of the terms and concepts he relied on in his evidence. He based his evidence on anthropological theory, empirical evidence, research and documents. The evidence was given in a clear, detailed and at times humorous manner. His evidence supported the brief evidence of the Indian witnesses, and provided background, context and an explanation of why their evidence of the events made sense to their whole way of life.

This was not the case in Jack. Here the anthropologist did not conduct any recent investigation but relied on her research and work from former years. She presented no theory, no cultural background or context and provided only inferences to supporting literature. She made a statement as to the length of time the Indians had practiced the burning ceremony in British Columbia without reference to factual evidence that would support it, even though many athropologists would strongly disagree with it.

The Court appeared to appreciate these differences. The various levels of court all agreed that in Tenale the anthropolgoist presented important statistical evidence and tied all the evidence together into a theoretical framework making it more easy to understand. In Jack, on the other hand, most of the courts found that the anthropologist's evidence merely confirmed the Indian witnesses' evidence. In this case the evidence of the Indians was presented in much

greater detail than that supplied by the expert.

It can be seen that an anthropologist can be of considerable value in providing background and cultural continuity to the evidence of other witnesses. An expert who sits through the trial and hears all the witnesses can tie their evidence together and link the parts to theory and cultural reality. This can give the court a much more complete sense of the motivation and actions of the accused. Because cases are decided on issues of law this evidence may not always be that used to decide a case. It is, however, an importat element in giving the best explanation of the situation to a court and must be presented by both lawyer and anthropologist in a theoretical framework that ties together all the evidence as done in Tenale.

V. ANTHROPOLOGY AND EXPERT EVIDENCE

A. Introduction

So far this thesis has examined the rules of evidence that are applied to expert witnesses who testify in Canadian courts. This has demonstrated what types of information experts can contribute to courts; that is, they may give direct evidence from their own observation and research, they may outline the theoretical principles that they follow based on authoritive literature, and they may give opinions based either on facts before the court or on hypothetical questions. In addition, a brief history of the use of anthropological experts in American and Canadian courts was outlined. These preceeding chapters have looked at the use of anthropological expert witnesses from the perspective of the courts. This chapter will undertake to look at this relationship from the perspective of the anthropologist, at least insofar as looking at the possible effects such experiences may have on anthropologists and the practice of anthropology.

Anthropologists, as social scientists, generally practice their profession in an academic setting where theories are developed and exchanged through research, reading, publishing and a constant exchange and challenge of information by colleagues. Research is generally conducted over an extended period of time. Results are often tested by means of the researcher presenting a paper at a learned

conference. Question, debate, contradiction and sometimes confirmation by other anthropologists may lead the researcher to accept, redefine or repeat the work presented. As a result, the body of knowledge continually grows. Likewise, the body of knowledge of the discipline is taught in universities in a fashion that allows for challenge and growth. While a certain amount of factual information must be delivered in a dogmatic fashion, theory and contemporary issues may be, and often are, presented so that students may have input and form their own opinions as to the position they take. The doctrine is growing and is usually presented as such.

When an anthropologist gives evidence in court the method of preparation for the case and method of presentation are greatly different from the norm of the profession. Often there is only a very short time for the anthropologist to research and prepare a position for the side that has requested it. The way the material is presented is also different--it must be presented as an indisputable statement. "Speculations, interpretations beyond secure data, and attempts to get reactions to a new idea can be exciting features of a seminar, but such forays are not meant for a record upon which cross-examination is based" (Wolfgang 1974: 245). In addition, the witness is asked specific questions that are directed at a legal issue known to counsel and the judge, but may be unknown to or legally misinterpreted by the anthropologist. The questions

may direct the witness to give information that appears to be anthropologically unsound or the witness may be denied the opportunity to express ideas that he feels are important academically. The witness also often finds that the court situation does not permit an exchange of ideas, it takes specific information from each witness and choses from among this for its decision. In addition to these features, the witness clearly represents one side in a dispute and is often directed by counsel before the trial to gather information supporting a specific aspect of one side of the case and is questioned only on this information and not on conflicting data or theory that may exist. In the absence of an anthropoligically informed opposing counsel, cross-examination will not elicit this information and the witness will be in the position of giving what may be only a portion of the whole information that he has knowledge of.

B. Interaction between the professions

As McMillan (1975: 163) states, social science ". . . is entitled to a respected place in the halls of justice. The study of people and their problems is a natural prerequisite of the legal decision of problems among people." In order to present social science evidence to the court lawyers must engage social scientists as experts, thus creating a relatonship between individuals in the two disciplines.

Why lawyers use anthropologists

Legal cases being conducted on the adversary system demand that the evidence given be supporting of or capable of being construed in favour of only one side of a case. Generally much care and consideration is employed to obtain the best expert possible who is willing to give evidence for the party who calls him and lawyers must use whatever means they can to find such experts.

As an extreme example, Lochner (1973: 822) suggested that ". . . an attorney may be especially receptive to using the social sciences if his case is unlikely to be won without recourse to novel methods of proof." This may have been the case in R. v. Jack and Charlie (1982) in which counsel entered evidence that a deer was hunted and killed by the Indian accused in order to provide deer meat to be burnt in a ceremony for some deceased ancestors. The courts did not accept this as a valid defence to the charges and convicted the accused. In this instance the use of a novel defence was not successful.

Many types of litigation involve experts as a matter of course. Psychiatrists are frequently called in criminal matters by defence lawyers for defence purposes or for speaking to sentence. Medical specialists are always called to substantiate or dispute compensation claims in personal injury actions. Lawyers are quick to discover which doctors are "plaintiff's experts" or "defendant's experts" and those

that will give either an unbiased medical opinion or will not get involved at all. "If one expert does not give the lawyer what he demands, he does not hesitate to discard him and search the market until he finds what he wants" (Friedman 1909-10: 254). In matters such as the prognosis for a person suffering from a "whiplash" injury the opinion of experts vary considerably and especially so when they appear for opposing sides in litigation. It is possible that lawyers could request anthropologists to give opposing evidence in a case concerning Indians, in matters such as the degree of assimilation, or the importance and prevelance of a native cultural practice among a group of Indians. As yet, this does not appear to be happening. Rose (1955: 215) points out:

> Clever lawyers will probably increasingly be aware of the possibility of hiring social scientists to serve as expert witnesses for their side, and--if this happens--conscientious judges will either have to acquaint themselves with the possibilities and limitations of social science to decide when the social science evidence is reliable or else rely on court-appointed social scientists who are presumably neutral.

Competence of lawyers

Social science experts, and in particular cultural anthropologists, are not frequently called. Lochner (1973) says that the single most important barrier to this is ignorance on the part of lawyers. He stated (1973: 825):

> Ignorance of the social sciences and the reluctance to use social science research suggests a failure in the education of most attorneys. The failure is two-fold: (1) It is a failure to become acquainted with a body of relevant information; and (2) it is a failure to be receptive to new ways of resolving legal problems.

Time constraints that do not allow for finding an anthropologist with expertise in the area of the legal issue, for adequate defence research, and reluctance of lawyers to try something new are also reasons for the lack of use of anthropologists as experts (Lochner 1973).

The decision of whether or not to use an anthropologist as an expert is also determined by the competence and experience of the lawyer. Once the decision has been made, the competence of both the lawyer introducing the evidence and the one conducting the cross-examination is extremely critical to the probability of the evidence being accepted by the trier of fact, be it judge or jury.

Incompetence or an insufficiency in ethical practice, may cause a lawyer to alienate an otherwise willing anthropologist from acting as an expert; or, on the other hand, may sway an overly compassionate anthropologist to

vigorously support a moral (but not necessarily legal) cause. Manners (1956: 76) notes:

> . . . certain subtle pressures are sometimes allegedly applied by the attorneys for the Indians in an effort to insure that the data uncovered by the investigator will at least cover the claim submitted by them. . . . Although the number of lawyers who might attempt this maneuver must be exceedingly small, one would be shortsighted to overlook the temptation this kind of thing presents.

In cases such as this, the anthropologist approached has the option to refuse to conduct research or to present information that does not meet the standards of the profession.

In dealing with anthropological experts the lawyer must be competent in finding the right person, giving adequate pre-trial instructions, conducting examination in chief to introduce the necessary information, and explaining the relevance of the evidence in context of the case at bar to the trier of fact. Opposing counsel must likewise be competent in cross-examination.

The lawyer who desires to call an expert must deal with many issues as Rose (1955: 217) states:

> The problem, of course, is one of the lawyer communicating the legal issue to a competent social scientist; the social scientist scouring the literature to ascertain if any relevant studies

> exist; if not, the social scientist indicating the expense and time necessary to do an adequate study; the social scientist communicating the scientific findings to the lawyer; the lawyer deciding the best way of bringing this evidence into court.

As can be seen competence must be possessed by both the lawyer and the anthropologist for the most effective employment of the possible evidence.

The lawyer's skill required to elicit the evidence from the anthropologist on the stand is somewhat dependent on the skill of the anthropologist and his understanding of the legal issues before the court. Assuming that the anthropologist is skilled, it is important that the lawyer be competent in his ability to explain the case to the anthropologist so that he may be able to give the evidence in as clear and uninterrupted fashion as possible. Skillful pre-trial preparation of the expert is critical.

From the opposing party's view, competent cross-examination of experts is essential. In regards to forensic scientists, Phillips (1977: 457) notes that such an expert

> . . . may be shocked in confronting a defence lawyer not only vested in the skills of the courtroom, but also possessing substantial expertise in the scientific field about which the expert witness is testifying. More and more lawyers are becoming knowledgeable in the varied fields of forensic

science.

Seminars and symposia are offered in a variety of topic areas, (Phillips 1977) specialty journals are available for lawyers (eg. Medical-Legal Journal) and recently many people trained in other professional fields such as medicine, accounting or engineering are completing law school and engaging in legal practice. As yet, few lawyers have become competently familiar with anthropological literature and practice, but this may change as anthropologists are used more often.

If the opposing lawyer does not have the expertise required to conduct effective cross-examination, the assistance of an opposing anthropologist may be employed. Such an anthropologist may be utilized solely for the purpose of teaching and coaching the lawyer for his cross-examination, or may be used as a witness giving opposing expert evidence. Cross-examination can be used to impeach the credibility of the expert or his evidence, either resulting in a diminished impact on the court.

Role of anthropologists in court

Lawyers direct the testimony of the expert by their employment, pre-trial instructions and questioning. Despite this, anthropologists in this capacity do have an active role to play. Ball (1960) asked not "should" experts play a role, but, "what role" should they play. This was answered

by McGurk (1960: 253) who said:

> It should be clear that I believe that social scientists should play a role in guiding legal process. But it should be equally clear that I believe their role should be that of the scientist, not that of the progagandistic social reformer.

Rose (1955: 215) agreed and offered an expanded opinion on the role:

> . . . the social scientist was in no way substituting for the lawyer; the social scientist cannot be an advocate in his role as scientist. It is equally important to recognize that the social scientist is not proposing a new rule to replace the law. He is not suggesting that principles of ethics or humanitarianism or majority rule (as determined by public opinion polls) replace the law, as some have suggested. What the social scientist can do in the courtroom is to present certain social facts that serve as conditions affecting the outcome of the case. That is, there are certain cases in which the judge must *assume* certain social facts to be true before he can arrive at any decision.

The anthropologist's role is that of providing specialized information to the court so that the court can make a legal decision based on the facts of the case, including the social and cultural facts as presented.

Variance in terminology

The purpose of the expert witness is to provide information of a specialized nature to the court for its assistance in determining the case before it. It is trite to say that exact communication of concepts is essential for this purpose, but this is a quality that is assumed to be present when it may in fact be absent. Judges, who often have no scientific background, must make decisions on cases involving difficult technical or theoretical issues in a variety of disciplines. Maslow (1960: 244) believed that expert witnesses "are skilled not only in their sciences but in the art of presenting the essential data to laymen." He saw that the lawyers task of convincing the court that social science evidence is necessary, useful and proper evidence is the most difficult issue. Social scientists, he said, need not fear that judges will not understand their theories and research. The opposing view, however, is equally sound. There is often a great problem in the communication of concepts especially when terminology from a special subject language is utilized. Further problems can arise when the witness does not intimately understand the legal issues and strategy involved in the case.

Lawyers and social scientists are trained to use different specialized languages, to conduct research in ways particular to each discipline and to utilize and present the data in different ways. While anthropologists will look at a

group or an issue from a more universal perspective, lawyers focus on only one side of an issue as demanded by the adversarial system. Another difficulty arises in the method of perception of ideas by the two disciplines. Lurie (1955: 364) illustrated one example of this:

> One of the difficulties of which the ethnologist must be especially aware is that lawyers think in terms of precedents while ethnologists think in terms of cultural generalizations. Thus, the ethnologist may see his concepts of land ownership as derived from one society interpreted as firm precedents in another case.

It is important for the anthropologist to clearly explain to the lawyer before the trial preparation is commenced the significance of cultural differences and the possible inapplicability of other cultural illustrations as precedent.

It is also important that the anthropologist and lawyer agree on terminology that will be used by the witness at trial. Any words that may appear in both disciplines, such as "property", "corporation", and "ownership", should be discussed so that the anthropologist will make it clear to the court the meaning that is attached to these words and the context within which they are used by anthropologists. In the absence of such explanation, the court will naturally interpret the words according to its own legal knowledge.

The ways in which lawyers interpret, question or apply social science research may also be of concern to social scientists. Wolfgang (1974) discussed this problem in reference to testimony he gave based on original research he conducted for a trial. He said (1974: 244):

> . . . instead of being asked questions directly related to the scientific limitations of the research, I was asked a series of questions that, from my scientific perspective, had no relationship to the thrust of the inquiry, or to the reliability or validity of the findings.

He found that the court formed opinions that "contravene the traditional scientific canons of response" (1984: 244). The opinions formed by the court or lawyers on the social science evidence can be upsetting to an expert, as Wolfgang suggested (1974: 244):

> These are common assertions made by persons who are not social scientists trained in statistics. Yet, the social scientist who becomes involved in testifying in this area must be prepared for arguments and decisions that are political or that reside in legal vicissitudes outside the framework of social science inquiry and evidence.

This perception may arise from the lack of understanding of the requirements for proof concerning the legal issue or of the strategy being employed by counsel.

This problem can be overcome by an increase in knowledge of the theories, techniques and terminology of the other's discipline. The anthropologist's difficulty arises from a lack of real acquaintance with the theory and practice of law; and the lawyer, likewise, generally has little or no training in the social sciences (Ball 1960). Such knowledge will not likely arise in formal education since law students are rarely aware of the type of legal practice they will pursue, and anthropology students can never know if they will be required as an expert witness. Courses are thus not justified. Seminars and publications could assist persons who are practitioners in either field who may participate in such litigation. The best method, however, appears to be an early and ongoing exchange of information and strategy between the lawyer and expert working together on a case.

C. Anthropologists

It is likely that cultural anthropologists will be utilized as expert witnesses in litigation with greater frequency in the future. Each individual that is requested to give evidence is faced with the same issues in making the decision first to appear, and secondly how to present anthropological information within the rules of evidence.

Motivation for appearing as an expert

Most people are pleased and honoured to be recognized as a person with special skills or knowledge, so must be anthropologists who are asked to appear as an "expert" for a court case. It is unlikely, however, that anyone would accept this job solely for the preceived glory of acknowledgment as an expert. Motivation for agreeing to act has generally been attributed to a desire to support a cause or group, monetary gain, or the desire to influence policy or legal changes.

Wolfgang (1974) stated that he was willing to act as an expert for the NAACP, since he supported equality of opportunity and was opposed to discrimination. He also stated that he turned down an opportunity to represent the National Rifle Association because of his opposition to civilian gun ownership. From this revelation, it would appear that Wolfgang acted only for causes that he was morally motivated to support, but in the same paper he later said (1974: 245):

> Lawyers should beware of those social scientists who are only too willing to be expert witnesses on the basis of their fervent feelings for the cause at issue. Unless such scientists have empirical evidentiary material to butress an argument, they will be more of a burden than a blessing.

The important criteria in being a social scientist motivated by a moral committment to a cause or issue, is excellence in research design and methodology, so that the evidence given

cannot be discredited even if the bias of the anthropologist is apparent.

There are certain temptations that may lead an anthropologist who is motivated by moral committment to an issue to lessen his research or methodological standards or vary his opinion in favour of the client. The motivation to help is one temptation. Another is the fact that the client stands to lose his liberty, money, land, or some other legal right if the court decides against him. A third is the fact that generally anthropological evidence goes unchallenged by the absence of opposing experts and by inadequate cross-examination. Finally, the fact that rarely does anyone else in the profession see or hear the evidence may have an influence on what is presented, at least in regards to the completeness of the material presented. The influence of these temptations to act may be encouraged by some lawyers who are attempting to win their case at any cost, but they should be considered when an anthropologist accepts the role of expert.

A second motivation for acting as an expert is the financial rewards that may be available. Many native clients do not have the financial resources to pay for experts and if Legal Aid is given the fees are fixed and generally quite small. There are, however, some very wealthy Indian bands, others who are supported by federal funding to seek a legal declaration on an issue, and still others that stand to receive large amounts of compensation for land claims or

from the awarding of damages and legal costs who can offer substantial payments to persons who support them. Loyalty to the person who pays the fee can be a reasonable motivation for acting (Steward 1955). The uncertainty of the job market and scarcity of university jobs has created a necessity for some social scientists to seek new forms of employment as consultants. Adams said of the American situation (1977: 264):

> United States anthropologists . . . split on whether they should be devoting themselves to research and the academy, or research and public action. These positions and their opposites are strategies employed, with greater or less wit and success, in the rationale that they will provide for a better survival for someone. The discipline's move toward the public sector during the Great Depression, then toward academia during its halcyon days, and now again toward the public area is merely the seeking of a strategy that seems to take better advantage of the market. The question has never been whether academia is more important than the public; rather, it is what is most likely to keep anthropologists alive.

Problems also exist for a witness who is motivated by the promise of compensation. Because of the legal requirements necessary to qualify a witness as an expert, it may be less likely that someone not associated with a university or who

is not actively employed as an anthropologist would be acceptable to the court. Monetary motivation, while it could not exist alone, may still be a factor, however.

Finally, there may be as an element of motivation the desire by an anthropologist to produce specific legal or policy changes (Lochner 1973). Research and publication may be directed towards this end, but it is also possible to give evidence that implies this desire. Courts having the function to apply, not to create or change the law, would be an ineffective forum for this exercise.

Whatever the motivation may be for an anthropologist to accept the task of being an expert, at present it is the lawyer who makes the first contact. Thus this factor is not as weighty as it would be if anthropologists were actively seeking out such employment. In the United States medical doctors and other professionals advertise their availability as experts in legal journals, which clearly demonstrates their motivation. Hopefully, such a practice will not be commenced by social scientists.

Bias of the expert

Another concern for expert witneses is that they are placed in a position of bias by virtue of the nature of the adversarial system. In a somewhat pessimistic tone Conrad said (1964: 445): "Any attempt to become scientifically objective in the Anglo-American legal system is doomed to

failure from the very beginning" and that the expert "must take a position for or against a party and therefore is placed in a position of bias right from the very start." Friedman (1909-10) commented that experts are sometimes thought of as "intellectual prostitutes". Regardless of whether or not an expert is motivated in favour of his client, the system creates, if not the requirement for bias, at least the appearance of it.

It is of course only reasonable that an expert witness will answer the questions addressed to him and thus give evidence for one side. The law has, however, a rule for the elimination or reduction of bias in expert evidence by the use of court appointed experts. A survey of American psychiatrists found that fifteen percent of those responding refused to testify as an expert unless they were in an impartial capacity (Guttmacher 1960-61). This is not yet an issue with anthropologists, but could become one if more cases employed experts on both sides.

Expert evidence as "truth"

Experts are sworn to tell "the whole truth and nothing but the truth". In order to do this they must meet two different standards. First, they must comply with the legal rules of evidence and second, they must meet the standards of their own profession in a manner consistant with court testimony.

Expert witnesses must firstly comply with the rules of evidence. Conrad saw this as an impediment to scientific investigation since, as he perceived it, the witness "must comform to truth as molded by lawyer-made artificial rules of evidence" (1964: 446). The rules of evidence, used in the adversarial system, permit the introduction of only that information which supports the case of the party calling it and allows for the omission of negative evidence. Wolfgang said of this (1974: 246):

> Evidence unsupportive of one's case, however complete or segmental it may be, has no function in the adversary game. Such evidence may be useful in a scientific article, but if one piece of evidence is contravened by other evidence, it has no proper place in argument before a court. . . . There is selectivity unlike that which exists in science.

Wolfgang suggests that acceptance of this fact should not be taken as surrender to the rules of evidence, but as "a filtering of the scientific rules through a set of values that may be different" (1974: 246). The legal rules are necessary for a finding of the truth for the purpose of a trial.

When two experts appear on opposite sides at a trial their evidence on the issues will be contradictory. The courts have experience in such situations and realize that there is usually some validity in each point of view. The rules govern how a court assesses credibility, admissibility

and weight to such evidence. Further considerations include a determination if conflicting theoretical positions exist, the general acceptance of the expert's doctrine among his professional peers, and whether the opinion offered is based on specific research or only on theoretical considerations (Maslow 1960). The court should also consider that (Lochner 1973: 828):

> Most often their differences can be accounted for. Social scientists investigating the same question may gather data differently, may make different assumptions, or may use different operational definitions. Inconsistent conclusions may only indicate procedural variations rather than intellectual chaos in the field.

The court must decide which evidence it will accept and the anthropologist acting as an expert need not be concerned with the legal definition of truth, but only with his own conclusions.

Anthropologists must satisfy not only themselves but also the court must be assured that their opinion is based on sound research and theoretical basis. There is a great danger in a social scientist "attempting to palm off on a court as solid conclusions opinions that are not based on verifiable data" (Maslow 1960: 245). Not only would this be damaging to the law if a case was decided on faulty opinion, but the anthropologist would be properly discredited in the legal community and by his peers once the evidence was made

public.

The problem is one of degrees. Courts, by the nature of the legal system, must make an absolute finding of fact. It tends to be almost, but not quite, black and white. Social science findings, on the other hand, are various shades of grey. The degree of reliability of social science findings varies from one study to another and from one method to the next. Social science findings are less reliable than those of the biological sciences, and considerably less reliable than the findings of the physical sciences. Social science findings also apply to an average situation and not to every similar situation (Rose 1955). Social scientists know this. Their task, when acting as an expert witness, is to explain this to a court which applies rules for the acceptance of opinion evidence which have been developed by reference to experts in the physical sciences. Steward summarised this concern (1955: 299):

> The "truth" is not a matter of whether some physical or biological event did or did not occur, as whether a person died of poisoning or whether a document was written by a certain individual. As pointed out previously, the fact that Indian groups are culturally distinctive makes it extraodinarily difficult to know exactly what must be proved about each in order to meet minimum requirements of a necessarily standard and unvarying law. As an expert, therefore, the witness must do more than

> present primary physical or social facts and then interpret them with reference to whether or not the nature of the Indian group meets the requirements of the Claims legislation. . . .
>
> The witness, as a competent anthropologist, must make a conscientious effort to present his case in a manner that meets the requirements of science. Also, he must phrase his problem so that his conclusions will be as relevant as possible to the basic issues of the litigation. . . . Finally, the anthropologist should set forth with all possible clarity his theoretical presuppositions and methodological procedures and relate his selection, appraisal, and interpretation of evidence to them.

The anthropologist must first be confident that his opinion is based on competent research, or by clearly stating which evidence presented at trial has been accepted by himself as the basis of his opinion. He must also explain the relevance of the theoretical basis of his opinion, and that this theory is one accepted by the discipline. This should satisfy the issue of presenting the truth for both the witness and the court.

D. Anthropological Interpretaion

Although the focus of this thesis is to examine the problems faced by anthropologists who must give evidence in court pursuant to the strict requirements of the rules of

evidence, it must be emphasised that anthropologists have always been concerned with the accuracy and quality of the academic statements they make.

Anthropologists have compiled ethnographies, analysed culture change and studied institutions and relationships in accordance with a number of theoretical models. These models have been developed, adopted and rejected throughout the relatively brief history of the discipline. Some theoretical models and methods have gradually developed being passed from "founder" to his students, and to his students' students. Others have been presented as a new theory and then been the subject of harsh public debates.

The origin of anthropology has been credited to Plato and Aristotle (Evans-Pritchard 1981), to Herodotus (Myres 1974) or to the period of Enlightenment the time of John Locke and Adam Smith (Harris 1968; Evans-Pritchard 1968). Generally the first scentific or systematc study recognized as anthropology s that of Lewis Henry Morgan (Meggers 1946; Voget 1960). Morgan, a so-called cultural evolutionist, systematically studied the Iroquois of New York State. His most important work was his attempt to classify all world cultures on a hierarchical or evolutionary scale.

Shortly after this theoretical development Boas and his students, using the approach known as historicism, dominated American anthropology (Meggers 1946). In this approach, also called "scientific history", the anthropologist looked at an antecedent cultural fact as the best explanation of a

succeeding fact. Within the focus of specific cultures, cultural growth was explained by diffusion, adaptation and interaction, rather than by independent origin and parallelism (Voget 1960). This was followed by the functionalist approach of Malinowski who saw every trait as having a function within the cultural context. Radcliff-Brown further developed a structural-functionalist theory which compared societies to study the maintenance operations that functioned to sustain the structural whole of the society. Many other theories were developed including culture and personality, acculturation studies, configuration theory, environmental determination and French structuralism (Garbarino 1977).

There arose from this conflicts between anthropologists who studied the same, or similar, cultures using different theoretical orientations or methodologies. There also was at times a tendency to denounce old theories with the development of new ones. This also led to conflicts. Some of these academic disputes over the correct interpretation of a society or culture were long lasting and very public, with opposing critical papers appearing in the journals or books.

The evolutionists have been criticised often (Radcliffe-Brown 1947, 1949; Lowie 1946; Bidney 1946) and alternately defended (White 1945). The British social anthropologists have been put down for having too narrow a scope of study (Murdock 1951) and have defended themselves (Radcliffe-Brown 1935). Research findings have varied by

anthropologists who studied in the same village (Lewis 1951; Redfield 1956; Goldkind 1965; and Blackman 1983; Stearns 1981).

These differences in theory and method and the disputes over different aproaches may appear as confusion or as making invalid the "scientific" nature of anthropological work. On the contrary this adds to the development of the discipline and the greater understanding of culture by the different viewpoints. Meggers concluded that it "is a good thing for a science to survey its works critically from time to time. When we look back over the path by which anthropology has come to 1945 we can see that it is not straight, but crooked and branching" (1946: 195). This makes the discipline and the work stronger. Differences in opinion between academics is well recognized within any discipline and also by the courts that hear them as experts.

E. The Role of the Discipline of Anthropology

The role of being an expert witness is one occupied by an individual anthropologist for a short period of time and for a specific purpose. The witness is qualified on his own behalf and gives evidence of his own opinion based on research and reading. Although the witness is an individual giving his own personal opinion, the legal system does not see him as such. He is to the court not Dr. X, but "an anthropologist". He gives not "an individual's" opinion, but that of "an anthropologist". The expert, in other words, is

more a human representative of a discipline, rather than an individual participant in the proceedings. The people in the legal system are trained to think in these terms. It is not Mr. Justice X who makes a decision, but it is the Court of Queen's Bench, the judge being the human agent. Likewise it is not defence counsel who makes an application, it is the accused; not the prosecutor, but Queen Elizabeth II.

In this light the discipline of anthropology has a role to play in regards to the use of expert witnesses. This role should be in two areas. First, the discipline could have a role in deciding who is an expert. Second, the discipline should have a duty to establish and sanction a code of professional ethics for those members who actively engage in activities that can permanently change the course of other people's lives.

The court must establish that a witness is an expert in order for the witness to give opinion evidence. The laws of evidence which apply were discussed in Chapter 2. These rules were developed by the courts and are applicable to all scientific disciplines. They were developed without consideration of the individual variation in research techniques, reliability of results and without input from the professions considered. These rules of qualification may be relied on by witnesses. It has been suggested that there may be a danger that some social scientists, once they are qualified as an expert by a court, abandon their professional standards and freely give their personal

opinions to the court (Cahn 1956). It would seem unlikely that this would be a frequent occurrence.

At present, the discipline of anthropology does not have direct access to suggest legal changes in the qualification of court experts. It can be demonstrated, however, through literature, conferences, and the process of individually qualifying experts at trials that there are special considerations that may exist. Steward (1955) has said that a long-established reputation in anthropology or extended experience among a group of Indians does not necessarily imply that a person will be competent as an expert witness. "With an appropriate sense of problem and an adequate methodology, a young man is just as capable as his more elderly colleague of ransacking historical documents for relevant information and reaching valid conclusions" (Steward 1955: 301). Other factors such as a prolonged residence among or association with a group, without a conscious effort to understand them based on historical knowledge or a theoretical framework, likewise does not result in a person being an expert. A change in a field of specialization, or a familiarity with a group other than the one which is the subject matter of the litigation also does not by itself determine that a person is not an expert. All of these points were illustrated in the case R. v. Tenale (1982) which found the anthropologist qualified as an expert because of his research techniques, study of a comparable group and application of theoretical framework, despite his

change in specialization, relative youth and unfamiliarity with the group on trial.

The discipline of anthropology by awarding graduate degrees at universities gives a paper qualification that is acceptable to courts. Journals by publication of papers contribute in a like manner. There is no uniform method, or body with the authority to define either specialization or competence of anthropologists. The application of the term expert is one that cannot be definitively awarded by the discipline, but its members, through consistant work of acceptable quality, can demonstrate to the courts what types of qualities an anthropological expert should possess.

The discipline does have a concern for the professional responsibility of its members. The Society for Applied Anthropology in Canada has a committee which is working on a paper to outline the ethical guidelines for applied anthropologists. They are making recommendations for the conduct of research, the dissemination of knowledge, relations with students, and relations with the public. Anthropologists and lawyers have also noted that the role of professionals must be determined by their own disciplines (Rosen 1977; Friedman 1909-10). Rosen (1977) believes that anthropological associations should formulate standards to guide those acting as expert witnesses. These standards should be recommendations not requirements, and be without sanctions of any sort.

Two main issues that may be addressed by such guidelines are what is the primary function of providing anthropological evidence, and what obligation should there be on the anthropologist to publish his finding. Redfield said that the social sciences are scientific in that they are concerned with telling "What Is, not What Ought to Be", and because they "exercise objectivity, pursue special knowledge, and move towards systematic formulation of this knowledge"(1966: 191). He held that social science has social uses which include the guiding of decisions in the management of human affairs, and in the testing and development of social values. There is a moral obligation on social scientists to ensure that their own moral values and biases do not interfere with their scientific study of society. This objectivity may be strained when expert witnesses are motivated to help a side win a case. Ethical guidelines, while not being capable of eliminating this problem, could give a witness a guideline to follow in presenting his material in court.

The obligation or the right of the anthropologist to publish research conducted for the purpose of litigation is an issue that should receive some guidance from the discipline. The Society for Applied Anthropology in Canada (1984) has suggested that anthropologists should not consent to employment from which the data would remain permanently confidential. The Society does recognize the need for confidentiality during immediate periods of the project.

This would be especially important in litigation for a period that extended to the expirary date of the last possible appeal. The privacy of individuals and groups must also be protected.

Jones (1955) advocated that anthropologists who appear as witnesses should publish their research undertaken for the case. His opinion was in the context of experts appearing before commissions when they have not necessarily taken one side or the other, but most often appear as neutral experts called by the investigating body. In this situation publication would not breach any confidence. Wolfgang (1974) discussed the obligation of an expert who is called by one party in litigation to publish his research results. He stated that he would publish results if they were contrary to the case of his employer and he was not therefore used as a witness. He did not discuss whether he would wait until they would not appear and be potentially utilized by opposing counsel against his employer on an appeal. He did however state that he would so publish even knowing they would be used in similar litigation against other litigants in the position of his employer. Because his research supported his employer he was not required to actually take this step. The position he took appears to be that it is more important to share good research with the community of anthropologists, than to suppress information in the interests of one litigant. This is a difficult dilemma which should receive guidance from the discipline.

F. Conclusion

There are potential dangers to anthropology in the possibility of increased use of anthropologists as expert witnesses. Some of these have been discussed, such as the motivation for acting, the temptation to conduct biased research, the concern that lawyers force experts to omit knowledge detremental to the case, the concern over what is the truth and the desire for standardized professional responsibility. These issues primarily concern individuals who are acting as experts. That is they are concerns of how an expert should react to his employment as an expert, how he must relate to the court situation, and whether he must act in a manner as dictated by the court or in one consistant with the actions of other anthropologists.

An issue which may be of greater concern to the discipline as a whole than to its individual members is the possibility of anthropologists becoming advocates. Other professions, most noteably medical specialists, have experts who act solely for one type of litigant and never for the other. As an articling student the author was given a list of doctors to employ if our client was a plaintiff, and a second list if our client was a defendant. If cases using anthropological evidence start to call experts on both sides on a regular basis the potential exists for such a division among members of this discipline.

Of course legitimate differences of interpretation and a variance in acceptance of theoretical models exists among

anthropologists (Rosen 1977). Such differences can be reasonably explained. It is unlikely however that opposing sides to a case would always find such naturally occuring academic variance by chance. What could happen is opposing "camps" of experts being informally trained through repeated use as experts for one side or the other in cases involving Indians and the government. Many anthropologists are naturally biased in favour of Indians and would prefer to represent the side of a case supporting the Indian's position. Such a bias is evident in a discussion by Manners (1956: 73):

> . . . I was present at the meetings of the American Ethnological Society . . . when one of the persons . . . asserted categorically that the Justice Department was reduced for the most part to a reliance on young graduate students and otherwise unproved anthropological researchers because reputable anthropologists with experience and detailed knowledge of particular Indian groups could not be prevailed upon to accept "employment against" the Indians. . . .
>
> In any case, such was the climate of opinion at these meetings that the speaker was roundly applauded for the forthright defense of ethical anthropologists and the unflattering allusions to those who were apparently unethical enough to accept an assignment with the Justice Department. And such

> was the general feeling about the matter that no one there (including the present writer) considered that it would be appropriate to defend those working "against" the Indians.

The general feeling, as Manners states, is that right-thinking people must properly assist Indians because of all the past wrongs committed against them. Giving expert evidence for a side opposite to Indian claims is construed as acting against them. Clearly there is a strong bias here. This indicates that at least these anthropologists believe they are acting for, or assisting the Indians advance their legal claims. This is being an advocate, not a scientist.

Lawyers having been trained in the use of precedent and relying on repeating actions in a consistant manner, often will employ a person who has previously given evidence on an issue as an expert in subsequent cases. Anthropologists who act as experts for Indians soon become known in the trial lawyer network and will likely be employed in a similar capacity in future trials. Once the Crown starts to use anthropologists as experts in opposition to the Indian's experts, a second group may be created. This division into Indian and Crown experts could be accentuated by the reluctance of lawyers and clients to employ some one who has once represented "the other side". Such people are sometimes perceived as unreliable, turncoats, or motivated by reasons other than the desire to help. The fact that such a person may be providing unbiased research may be overlooked.

If this resulted the discipline of anthropology could suffer by being split into two biased camps, or by having the appearance of having such a split. Steward addressed this when he stated (1955: 302):

> If anthropology is to maintain a scientific standing in these cases it must recognize that it would be truly embarrassing were persons holding identical theoretical views to interpret the same body of evidence in opposite ways because they happen to be witnesses for opposing sides in a particular case. Sympathy for the Indians or the taxpayer, monetary considerations, and other factors perhaps subtly influence the witness, but I would like to think that they are insignificant, that the cynical statement made to me by one of the lawyers for a Plaintiff that "of course witnesses suppressed, twisted, and misinterpreted evidence in order to win their cases" is not true. . . . What is crucially important is that the failure to clarify reasons for disagreement between witnesses--and in some cases to show that there is really very little disagreement--discredits Anthropology as a science, confuses anthropologists themselves, and must certainly leave the Commission in great doubt as to what the truth is.

At present this problem does not exist in Canada. A large portion of the anthropological expert evidence that is

given is presented to Commissions or Boards of Inquiry which do not follow the law of evidence, and which are not conducted on an advesarial system. Anthropologists can present their evidence in such instances in a scientific manner, without accusation of bias. It is the court situation with the rules of evidence and the requirement for taking sides that presents the major danger. This however can be overcome. The law permits the appointment of court experts, who give evidence on the scientific issues without reference to either side. Both sides have the right to cross-examination thereby putting the evidence to the closest scruteny. It has been suggested that most disputes could be settled more easily if experts could discuss and share information rather than acting as antagonists (Laurie 1955). Such sharing of information is done in the normal course of academic research, and if information was presented to the court by one expert, it would leave the resolution of the issue to its proper authority--the court.

There is provision in the law for court appointed experts, and precedent for their use. Their use would not replace the right of both parties to the use of experts, but would add a neutral expert, balance expert evidence when only one party produced one, or provide an expert when neither party called such evidence. A lobby by anthropological associations of the courts, law societies and governments could encourage the use of experts in this manner and reduce or eliminate a potential split in the

discipline.

VI. CONCLUSION

This thesis attempts to contribute to two disciplines, and within each to advance the discipline of anthropology.

For the discipline of anthropology, this is a study of another discipline that is normally closed to outsiders--the legal system. It does not study the whole system, but selectively looks at that part of the legal system which uses anthropological knowledge--the courts. By examining the use of anthropologist expert witnesses in court one can understand not only the court's development of knowledge in an area external to law and how this external knowledge is incorporated into legal reasoning, but what impact anthropology can have on this other discipline.

The first part of the thesis demonstrates legal concepts, the legal system of knowledge which is bounded by statute and precedent, and rules of evidence that can allow external knowledge to influence the law. This is presented to give anthropologists an understanding of how they can fit into the trial process and what the limits of their contribution are. While an anthropologist's contribution is limited by the questions he is asked, the contribution of anthropology is unlimited in its potential value.

This is an anthropological study of a part of the legal system in order to gain a better understanding of anthropology's contribution to knowledge.

To the discipline of law this thesis provides an understanding of a source of knowledge that is not used to

its fullest possible extent. It shows that some law making decisions are based on arbatrary rules set down without consideration of social and cultural factors. The legal profession is only recently beginning to become aware of the importance of social considerations. Anthropologists can assist in this awareness.

The use of social scientists as experts, however, is sadly underdeveloped in Canada. There are very few reported cases, and it is easy to speculate very few unreported ones as well, that use anthropologists as experts. Many of those cases which did employ anthropologists appear not to have utilized the expert to the fullest extent that may have been possible.

It is the responsibility of the lawyers to decide if they need or could use anthropological evidence. They make this decision based on their legal knowledge and experience. This knowledge and experience, however, rarely included an idea of the usefullness of anthropological expert evidence. This applies to lawyers representing Indians and members of other ethnic and social groups, and to the lawyers representing the opposing parties.

There are no legal or academic reasons why social science evidence should not be greatly increased in use. The cases show that such evidence is needed and should be used more often.

Anthropologists could make lawyers aware of their availability and usefulness as experts. This could be done

by attending legal conferences and presenting papers on their participation in cases, by joining professional associations that includes lawyers and ethnic groups, and by publishing papers of their experience as experts in legal journals. While it would not appear to be judicious to take out advertisements offering services as experts, it would be useful to create an awareness of the usefulness of such assistance.

Anthropologists hired to act must ensure that they have no personal conflict with the position of the side that hires them. They will be asked to give only that evidence which supports their client and must be able to do so with a free conscience that it is the best evidence they can give.

While supporting the value of anthropologists as experts, both anthropologists and lawyers should be careful that such experts do not replace or overshadow the value of natives as "experts". Native witnesses should be used with anthropologists as a team to give the most complete evidence possible.

Anthropologists acting as witnesses should make themselves as familiar with the case as possible and utilize all sources to do this. Although the lawyer may be unwilling or too busy to encourage full participation, it should be sought. The witness should ensure that they are fully briefed in the terminology they should use, the types of questions they will be asked, what supporting materials and aids they are expected to bring and their expected

participation with the other witnesses.

With an increase in the use of anthropologists as experts the time should come when the two disciplines of anthropology and law can be utilized as a team to obtain the best possible future for Canadians of all ethnic and social groups.

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